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# Supreme Court of the United States.

OCTOBER TERM, 1968.

No. 358

JACK DOUGLAS, ALEXANDER CELESTE, ARTHUR J. O'NEILL AND FRANK CELESTE,
*Petitioners,*
*v.*
THE COMMONWEALTH OF MASSACHUSETTS,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

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## Table of Contents.


Opinion below 1

Statement of grounds on which jurisdiction is invoked 1

Questions presented 5

Argument 5

a. This case presents the Court with an opportunity to reconsider and overrule the much criticized case of On Lee v. United States 6

b. There is a direct conflict between the Circuits and between two Circuit Courts and the Massachusetts Supreme Judicial Court 14

Conclusion 20

Appendix A—Opinion of Massachusetts Supreme Judicial Court in Commonwealth v. Douglas 21

Appendix B—Opinion of Massachusetts Supreme Judicial Court in Commonwealth v. Maiani 37

Appendix C—Opinion of Court of Appeals for Seventh Circuit in United States v. White 42

Appendix D—Opinion of Court of Appeals for Tenth Circuit in Doty v. United States 51


## Table of Authorities Cited.

### Cases.


Berger v. New York, 388 U.S. 41 12n., 13n.

Commonwealth v. Douglas, Mass. Adv. Sh. (1968) 641 (App. A, infra, p. 21) 1, 13, 14, 15

Commonwealth v. Maiani, Mass. Adv. Sh. (1968) 837 (Appendix B, infra, p. 37) 19

Commonwealth v. Murray, 423 Pa. 37 18

Dancy v. United States,—F. 2d—(5th Cir. 1968) 16

Doty v. United States (Appendix D, infra, p. 51) 15

Dryden v. United States, 3 Crim. L. Rep. 2028 16n.

Goldman v. United States, 316 U.S. 129 10n.

Katz v. United States, 389 U.S. 347 6, 7, 8, 9, 10, 11, 12, 15, 16n.

Lee v. Florida,—U.S.—, 36 L.W. 4652 6, 8, 9n., 16, 17n.

Lee v. Florida, 3 Crim. L. Rep. 4056 9n.

Lopez v. United States, 373 U.S. 427 6, 7, 8n., 9, 10n., 11n., 15

On Lee v. United States, 343 U.S. 747 6, 7, 8, 9, 10n., 15

Osborn v. United States, 385 U.S. 323 6, 7, 10n., 11n., 12, 13, 14, 15, 18, 19

People v. Kurth, 34 Ill. 2d 387 18

Rathbun v. United States, 355 U.S. 107 6, 7, 11n., 15, 17

United States v. White, 36 L.W. 2613 (Appendix C, infra, p. 42) 14, 15, 16

STATUTES, ETC.

Federal Communications Act, 48 Stat. 1064, 1103, 47 U.S.C. § 605 4, 5, 8, 12, 16, 17, 18

31 Fed. Reg. 3397, 3398 18n.

31 Fed. Reg. 3400, § 15.11 17

Fourteenth Amendment to U.S. Constitution 5, 8n., 11, 16

Fourth Amendment to U.S. Constitution 5, 8n., 10, 11, 16

Ill. Ann. Stat., c. 38, § 14-2a 18

Mass. G.L. c. 272, § 99 (as amended by St. 1959, c. 449, § 1) 13n.

Mass. G.L. c. 272, §§ 99-101 4

28 U.S.C. § 1257(3) 1

MISCELLANEOUS.

Greenawalt, "The Consent Problem in Wiretapping and Eavesdropping: Surreptitious Monitoring with the Consent of a Participant in a Conversation," 68 Col. L. Rev. 189 13

Schwartz, "Electronic Eavesdropping—What the Supreme Court Did Not Do," 4 Crim. Law Bul. 83 9, 13

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## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

### Opinion Below.

The opinion of the Supreme Judicial Court of Massachusetts is printed in Mass. Adv. Sh. (1968) 641 (Appendix A, *infra,* p. 21).

### Statement of Grounds on which Jurisdiction is Invoked.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

The judgments sought to be reviewed were entered on May 3, 1968.

The facts of this case squarely raise the recurring and important constitutional and statutory issue of whether the

police may, without prior judicial approval, record and introduce into evidence the telephone conversation between a criminal defendant who was unaware that his conversation was being monitored and a person who consented to the installation of the recording device. The relevant facts giving rise to this issue are as follows:

On October 27, 1966, the Suffolk County Grand Jury returned the indictments enumerated below against the defendants, Jack Douglas, Frank Celeste, Alexander Celeste and Arthur J. O'Neill, upon which they were subsequently convicted.[1]

Petitioners filed motions to suppress and exclude from the evidence testimony concerning the contents of a tape-recorded telephone conversation, and petitioners preserved their rights to appeal the denial of their motions by taking timely exceptions to the rulings of the trial Court. Assignments of error Nos. 3, 10, 21, 23, 27 of Frank Celeste (R. 43, 48, 49); Nos. 3, 23, 26, 27 of Douglas (R. 125, 130, 131); Nos. 2, 22, 27 of Alexander Celeste (R. 157, 162, 163); and Nos. 3, 22, 27 of O'Neill (R. 141, 146, 148); No. 6 of O'Neill (R. 142); and No. 7 of Alexander Celeste (R. 158). It is beyond dispute that this constituted an important part of

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[1]

| Indictment No. | Defendant | Offense |
|---|---|---|
| 26323 | Douglas | Threats to extort |
| 26324 | Douglas | Threats to extort |
| 26326 | F. Celeste | Violation of Mass. G.L. c. 140, § 110 |
| 26329 | A. Celeste | Violation of Mass. G.L. c. 140, § 110 |
| 26330 | A. Celeste | Accessory before fact to threats to extort |
| 26378 | A. Celeste | Accessory before fact to threats to extort |
| 26381 | O'Neill | Threats to extort |
| 26382 | O'Neill | Threats to extort |
| 26380 | Douglas | Conspiracy to extort |
| 26380 | F. Celeste | Conspiracy to extort |
| 26380 | A. Celeste | Conspiracy to extort |
| 26380 | O'Neill | Conspiracy to extort |

the Commonwealth's case and that, if it was improperly admitted, petitioners' convictions cannot stand. The petitioners appealed their convictions to the Supreme Judicial Court of the Commonwealth of Massachusetts, arguing, *inter alia,* the exceptions and assignments of error listed above. The convictions were affirmed on May 3, 1968, and judgments were entered on May 3, 1968, on which date the convictions became final under Massachusetts law.[2]

During the course of the hearing on the motions to suppress, it was established that detectives from the office of the Suffolk County District Attorney conferred with one Melvin Sacks concerning the subject matter of the instant cases (Tr. of November 30, 1966, p. 95). Thereafter, on October 11, 1966, and October 12, 1966, Detective McLean of the District Attorney's staff listened to telephone conversations between Sacks and the defendant Douglas, by means of an extension telephone in Sacks's home (Tr. of November 30, 1966, pp. 99, 111). Detective McLean testified that he overheard two telephone calls, using an extension telephone, without making himself known to the party on the other end of the line; that the telephone call of October 11 was placed by Sacks, and that the call of October 12 was an incoming call made to Sacks. Detective McLean also testified that there was no "tap" on Sacks's phone at that time (Tr. of November 30, 1966, p. 114). During the Commonwealth's opening it became apparent that a tape recorder had been connected to Sacks's telephone (Tr. 90).

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[2] The Commonwealth then moved for revocation of the stays of execution of sentence then in force, which motions were granted, over the objections of the petitioners, by the Supreme Judicial Court in the cases of Douglas and Alexander Celeste, and by the Superior Court in the case of Frank Celeste. On May 31, 1968, an application for stay of execution of sentence pending certiorari was denied by Associate Justice Fortas, and all of the petitioners are presently serving their sentences.

There was testimony that the tape recorder had been installed on or about October 11, 1966; that the first machine did not function properly, and that a second machine was installed on or about October 15, 1966 (Tr. 226-227). Sacks testified that on Sunday, October 16, 1966, in the presence of an attorney named Ring, he telephoned the petitioner Douglas (Tr. 222), and that the conversation which took place between them was recorded.

A voir dire was held on the admissibility of the tape-recorded conversation (Tr. 296). During the voir dire Detective McLean testified that he plugged the tape recorder into the telephone lines in Sacks's home (Tr. 226, 240); that no application was made to the Court for permission to overhear or record the conversations (Tr. 242); that the consent of the telephone company was not obtained, and telephone company equipment was not used (Tr. 241). Detective McLean stated that the equipment and tapes used were the property of the County of Suffolk (Tr. 235) and were installed in Sacks's home at the direction of Detective Doyle (Tr. 225).[3]

The trial judge was asked to take judicial notice of the provisions of section 605 of the Federal Communications Act, 48 Stat. 1064, 1103, 47 U.S.C. § 605, penalizing unauthorized interception of communications (Tr. 806). The Commonwealth conceded that no judicial authorization for a wiretap was sought or granted in accordance with Mass. G.L. c. 272, §§ 99-101, as amended (Tr. 806). The trial judge ruled that the tape-recorded conversation was admissible, and permitted the tape recording to be played to the jury twice during the trial, over the objections and exceptions of counsel, as noted *supra*.

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[3] Detective McLean also testified that the tapes used could be edited or spliced (Tr. 239), and that tapes could be doctored or erased; that words could be added or erased (Tr. 239, 244, 802, 803).

## Questions Presented.

I. Do the Fourth and Fourteenth Amendments to the United States Constitution require prior judicial approval before the police may lawfully record and introduce into evidence the contents of a telephone conversation between a criminal defendant who was unaware that the conversation was being monitored and a person who consented to the installation of the recording device on his telephone?

II. Do section 605 of the Federal Communications Act and the regulations promulgated thereunder require prior judicial approval before the police may lawfully record and introduce into evidence the contents of a telephone conversation between a criminal defendant who was unaware that the conversation was being monitored and a person who consented to the installation of the recording device on his telephone?

## Argument.

This case raises—in clear and dramatic form—an important constitutional and statutory issue which has divided this Court over the years. Petitioners' convictions rest on a tape recording obtained by the police, who, without prior judicial approval, attached an electronic recording device to the telephone of one Sacks, and then had him place a call to petitioner Douglas; during the call Douglas made certain statements incriminating to all the petitioners; these statements were recorded and, over the repeated objection of petitioners, the tape was played to the jury. The recording was played not to corroborate live testimony of the conversation already given; on the contrary, the recording itself was the chief evidence of the conversation, and live testimony was introduced merely to corroborate and elaborate it.

*a. This case presents the Court with an opportunity to reconsider and overrule the much criticized case of On Lee v. United States.*

The violation of these petitioners' rights under the Fourth and Fourteenth Amendments goes well beyond the violations claimed in such cases as *Lopez* v. *United States,* 373 U.S. 427 (1963); *Rathbun* v. *United States,* 355 U.S. 107 (1957); and *Osborn* v. *United States,* 385 U.S. 323 (1966). This conviction can be sustained only if the Court is willing to rest on the crumbling authority of *On Lee* v. *United States,* 343 U.S. 747 (1952).

In *Lopez* the "only purpose the recording served was to protect the credibility of Davis against that of a man who wished to corrupt a public servant . . ." 373 U.S. 427, 442 (concurring opinion of the Chief Justice). Here, the purpose was quite clearly to gather evidence of a crime. Moreover, in *Lopez* the defendant was at least aware that he was speaking to a government agent; here, petitioner Douglas thought that he was talking to a long-time associate and co-worker. Thus, in terms of the test announced in *Katz* v. *United States,* 389 U.S. 347 (1967)—whether the defendant is "entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world" (*id.* at 352)—the petitioners here have a decidedly stronger claim than did *Lopez.* Finally, the *Lopez* case did not involve telephonic communication, and hence did not raise any issue under section 605 of the Federal Communications Act. This case, which did involve interception and divulgence of a telephone conversation, raises considerable question under that Act. *Cf. Lee* v. *Florida,* — U.S. — (1968), 36 L.W. 4652.

In *Rathbun, supra,* the police listened to a conversation on a telephone extension which "had not been installed there just for this purpose but was a regular connection,

previously placed and normally used." 355 U.S. at 108. The Court emphasized the well-known fact that the "telephone extension is a widely used instrument of home and office . . ." *Id.* at 109. Thus—again in terms of the test announced in *Katz* (see *supra*)—the petitioner Douglas was more "justified" in relying on the expectation that the police would not install a special device to record his conversation than was Rathbun in expecting that no one would listen in over a regularly used extension. Indeed, in this case petitioner Douglas knew that Sacks *did not have* an extension (or a party line) on his home telephone. Moreover, *Rathbun* did not involve any secret recording of conversations; nor the playing of a tape to the jury. In that case, at 108, "the police officers testified" as to the contents of the conversation. Thus this case combines some of the evils alleged in *On Lee* v. *United States,* 343 U.S. 747 (1952), with those claimed in *Rathbun.*

In *Osborn, supra,* there was, of course, prior "judicial authorization" for the recording. And the Court relied heavily on this in concluding that—

> "There could hardly be a clearer example of ' "the procedure of antecedent justification before a magistrate that is central to the Fourth Amendment" ' as *'a precondition of lawful electronic surveillance.'* " (Emphasis added.) 385 U.S. at 330.

In this case, although it is conceded that there was electronic recording, there was no prior judicial authorization of any kind. The Court in *Osborn* explicitly disavowed reliance "upon the broad foundation of the Court's opinion in *Lopez* . . . ," and instead decided the case "within the narrower compass of the *Lopez* concurring and dissenting opinions." *Id.* at 327. This case seems clearly to fall outside that "narrower compass."

The facts of this case force a reconsideration of the crumbling authority of *On Lee* v. *United States,* 343 U.S. 747 (1952). In *On Lee,* like here, the police overheard a conversation between the defendant and an "associate" who, unknown to the defendant, had joined forces with the police. In *On Lee* the conversation was overheard by means of a transmitter hidden on the "associate," while in this case the conversation was monitored by a recording device attached to the "associate's" telephone. Accordingly, in at least one important respect this situation presents an even stronger case for reversal than *On Lee* did. In that case there was no interception of a telephone call, and hence no substantial issue under section 605 of the Federal Communications Act. In this case this issue under that Act is substantial indeed. See *Lee* v. *Florida, supra.* Moreover, in that case there was no recording device used, while here there was. Again—in terms of the test announced in *Katz, supra,* p. 6—a person may place more "justified reliance" on his conversation not being recorded than on its not being overheard.[4] (See note 5, *infra.*)

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[4] There is one respect in which this case may not be as strong for reversal—at least in the view of former Chief Justice Warren—as *On Lee.* In that case the government, at the trial, "put on the narcotics agent who had been at the receiving end of the radio contact" instead of putting on the less reputable informant himself. See concurring opinion of Mr. Chief Justice Warren in *Lopez* v. *United States, supra,* at 441, 443. In this case the government similarly used the tape recording, rather than Mr. Sacks, to present the evidence of the conversation. But here, unlike in *On Lee,* Sacks had been called to the stand by the government for other testimony and to corroborate the tape, and was thus available for cross-examination. This difference does not, however, have any bearing on the issues raised under the Fourth and Fourteenth Amendments; it goes only to the fairness of the conduct of the trial itself. As far as the violation of rights under those amendments is concerned, this case is indistinguishable from *On Lee.*

It would appear that a number of sitting Justices now "agree with Mr. Justice Brennan that *On Lee* was wrongly decided and should not be revitalized . . ." *Lopez* v. *United States, supra,* at 441 (concurring opinion of former Chief Justice Warren) and 446 (dissenting opinion of Mr. Justice Brennan, Mr. Justice Douglas and former Justice Goldberg). Moreover, two present Justices, who were not on the Court when *On Lee* was decided (Mr. Justice Marshall and Chief Justice designate Fortas) have never joined an opinion which "revitalized" that case. Indeed, both of these recently appointed Justices have expressed views which suggest that they might not sustain a conviction in a case like this.[5]

It is not surprising, therefore, that a distinguished scholar on electronic eavesdropping and the Supreme Court has recently concluded that—

> "The Court may thus be moving toward an adoption of Justice Brennan's dissenting views in *Lopez* that all forms of electronic aids to the ear must comply with the Fourth Amendment." Schwartz, "Electronic Eavesdropping—What the Supreme Court Did Not Do," 4 Crim. Law Bul. 83, 87 (1968).

This case presents the Court with a unique opportunity to apply its clarifying decision in *Katz* v. *United States,* 389 U.S. 347 (1967), to the age-old and continuing problem of

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[5] See the reported statement of Mr. Justice Marshall at the oral argument in *Lee* v. *Florida,* 3 Crim. L. Rep. 4056: "Mr. Justice Marshall pointed out that while a person with a party line might reasonably expect that someone might listen in to a conversation he would never anticipate that the conversation would be recorded." See also the reported statement of Mr. Justice Fortas in the same argument: "I don't think that the use of a party line telephone releases a man from his right to be constitutionally protected by the Fourth Amendment." *Id.* at 4057. See *Lee* v. *Florida, supra.*

electronic recording of conversations with the consent of one party but without the knowledge of the other.

Previous cases raising this and related issues have all been decided on the now discredited " 'trespass' doctrine," which "can no longer be regarded as controlling."[6] 389 U.S. at 353. Under that "all or nothing" theory, the initial and often dispositive question was whether the overheard conversation occurred in a "constitutionally protected area." 389 U.S. at 370. If it did, then all the safeguards of the Fourth Amendment were thought to apply; if it did not, then none of these safeguards were deemed applicable. *Katz,* on the other hand, seems to recognize a *continuum* of constitutional protections, which begins with conversations that all men would legitimately expect to be completely private and extends to conversations in which there is some reasonable expectation of partial, though not complete, privacy. Indeed, in the *Katz* case itself, the Court suggested that Katz's conversation in a glass phone-booth may not have been protected from "the intruding eye" (*e.g.,* a lipreader), but that it was protected from "the uninvited ear."[7] The important and recurring question raised by this case is whether a person speaking to an "as-

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[6] In *On Lee* the Court, citing *Goldman* v. *United States,* 316 U.S. 129, relied heavily on its conclusion that "no trespass was committed." 343 U.S. at 747. And in *Lopez* the Court emphasized the similar point that the agent "was not guilty of an unlawful invasion of petitioner's office. . . ." 373 U.S. at 438. In *Osborn* the Court did not rely on the trespass theory, but in that case the police had secured prior judicial approval.

[7] As Justice Harlan put it in his concurring opinion: "[T]here is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.' " 389 U.S. at 361. There can be no question in this case that the first—factual—requirement has been met; what petitioners will ask this Court to decide is the important policy issue of whether the second requirement is also fulfilled.

sociate" on his own telephone is justified in relying on the expectation "that the words he utters into the mouthpiece will not be broadcast to the world." 389 U.S. at 352.

The Massachusetts Supreme Judicial Court decided this case on a theory strikingly similar to that rejected by the United States Supreme Court in *Katz*. It held, in effect, that there was no wiretap at all, because one of the parties to the conversation consented. It concluded, therefore, that the Fourth and Fourteenth Amendments were wholly inapplicable and afforded no protection whatever.[8] This "all or nothing" approach, which omits any consideration of justified reliance on partial privacy, seems inconsistent with the reasoning of this Court in *Katz*. In our brief and arguments we intend to ask this Court to recognize that a person who speaks into a telephone has some justification in expecting that his conversation will not be recorded by the police, even with the consent of the other party.[9] It may well be true that he has somewhat less justified reliance than when the other party has not consented. But this should not be dispositive under the Supreme Court's approach to the Fourth Amendment. Some prior judicial approval should be required whenever the police seek to intrude into and record a conversation that one party reasonably expects will not be "broadcast to the world." Since the invasion of privacy may be somewhat less when one party has consented than where neither party has con-

[8] Furthermore, the Supreme Judicial Court also seemed to accept the theory of the trial Court that the Fourth Amendment does not apply to "a recording of telephone threats, themselves constituting the commission of a crime. . . ." This also seems inconsistent with the approach taken by the United States Supreme Court: the conversations in *Osborn* (and in *Lopez* and *Rathbun* as well) also constituted a crime; yet the Court assumed they were no different from other, merely evidentiary, statements.

[9] See statement of Mr. Justice Marshall cited in note 5, *supra*.

sented, perhaps the requirements for securing prior judicial approval ought to be somewhat less rigorous.[10] But surely some prior judicial approval should be required where, as here, there has been a significant violation of the scope of privacy on which petitioner Douglas "justifiably relied," 389 U.S. at 353; and there are no "legitimate needs of law enforcement [which] . . . demand specific exceptions" to the requirement of prior judicial approval. *Id.* at 362 (concurring opinion of Mr. Justice Harlan).

This Court has strongly suggested such a requirement already in *Osborn* v. *United States,* 385 U.S. 323 (1966). In that case the invasion of petitioner's privacy was no greater than here. Indeed, his reliance was, if anything, less justifiable there than here. In that case, as here, one party to the conversation consented to its being recorded. In that case, but not here, petitioner "knew he was talking to a law enforcement officer . . ." (at 327, footnote 4). Moreover, in that case the conversation was a face to face one, the recording and divulging of which is not regulated by statute; while here petitioner could reasonably place some reliance on section 605 of the Federal Communications Act, which regulates disclosure of intercepted telephone messages. In any event, it certainly cannot be argued that the violation of petitioner Douglas's right of privacy here was less substantial than the violation alleged in the *Osborn* case. Yet in that case the Court rested its decision on the fact that the prosecutor there employed " ' "the procedure of antecedent justification before a magistrate that is central to the Fourth Amendment" ' as 'a precondition of lawful electronic surveillance' " (385 U.S. at 330), while here it is undisputed that this procedure of "antecedent justifica-

[10] For example, since only one party's rights are being violated, perhaps the requirement of specificity may be relaxed, or the permissible duration of the tap may be expanded. *Cf. Berger* v. *New York,* 388 U.S. 41 (1967).

tion" was not followed, although a state statute made it possible to ask for prior approval and although there were no pressing reasons for failing to do so.[11]

It is unclear whether this Court would have sustained Osborn's conviction if there had been no antecedent justification "which fully met the 'requirement of particularity' which the dissenting opinion in *Lopez* found necessary." 385 U.S. at 329. It seems patently clear that at least some of the Justices who voted to affirm that conviction might have had other views if there had not been such prior approval.

We intend to ask this Court, therefore, to interpret its recent decisions as one distinguished scholar has already suggested:

> "The frequent and approving references to *Osborn* in *Katz* may also imply a Fourth Amendment court-order requirement for the recording of a conversation by one of the parties." Schwartz, "Electronic Eavesdropping—What the Supreme Court Did Not Do," 4 Crim. Law Bul. 83, 87 (1968.)[12]

Another commentator has also noted that "*Osborn* and the *Berger-Katz* gloss on that case may indicate that the Court is moving toward a court order system for participant as well as third party monitoring." Greenawalt, "The Consent Problem in Wiretapping and Eavesdropping: Sur-

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[11] The Supreme Judicial Court construed the statute, Mass. G.L. c. 272, § 99 (as amended by St. 1959, c. 449, § 1), as not requiring Court approval if one of the parties consents. *Commonwealth* v. *Douglas*, Mass. Adv. Sh. (1968) 641, 647-648, Appendix A, *infra*, p. 21. Thus the United States Supreme Court must decide the case as if there were no state statute governing the recording of the telephone conversations in which one party consents.

[12] This Court also cited *Osborn* with approval—indeed relied on it—in *Berger* v. *New York*, 388 U.S. 41, 55-56 (1967).

reptitious Monitoring with the Consent of a Participant in a Conversation," 68 Col. L. Rev. 189 (1968).

The facts and opinion of the Supreme Judicial Court of Massachusetts in this case raise this important issue crisply and appropriately. (See the opinion in Appendix A, *infra*, p. 21.) They provide this Court with a unique opportunity to clarify its decision in *Osborn* and to tell law-enforcement officials and Courts all over the Country whether its approving references to prior judicial authorization in *Osborn* was merely elaborate *dictum* or a requirement of the United States Constitution.

*b. There is a direct conflict between the Circuits and between two Circuit Courts and the Massachusetts Supreme Judicial Court.*

It should not be surprising, in light of the importance and difficulty of the above-discussed issue, that state and federal courts are confused and divided over whether prior judicial approval is required for electronic monitoring of telephone conversations where one party has consented. Indeed, there is a direct conflict among the Circuits, and between the Supreme Judicial Court of Massachusetts and the Seventh and Tenth Circuits over this important matter of federal constitutional law.

On March 18, 1968, the United States Court of Appeals for the Seventh Circuit decided the case of *United States* v. *White*, 36 U.S. L.W. 2613. (The text of the opinion is attached as Appendix C, *infra*, p. 42.) In that decision the Circuit Court explicitly decided to "apply the principles announced by the Supreme Court in its recent pronouncement in *Katz* to the situation here presented." The "situation" there presented involved a conviction which rested in part on the testimony of agents "that they heard defendant make self-incriminating statements, which had been trans-

mitted over the air by an electronic device hidden under the informer's clothes." The government had not "relied on any warrant or court order." The Court reversed the conviction, over a dissent which, like the Supreme Judicial Court in this case, argued that "there was no 'eavesdropping' involved in the instant case [because] one party to the conversation consented to their electronic recording and transmission." That the majority opinion in the *White* case was in direct conflict with their opinion in this case was not disputed by the Massachusetts Supreme Judicial Court. They made no effort to distinguish *White;* instead they described it as "a case which seems inconsistent with the Supreme Court decisions already cited." Mass. Adv. Sh. (1968) 641, 649-650, Appendix A, *infra,* p. 31. And the Massachusetts Supreme Judicial Court is correct; the Seventh Circuit case is "inconsistent" with the Supreme Court's decisions in *On Lee, Rathbun* and *Lopez.* It follows the more recent decisions in *Osborn* and *Katz* and the minority opinions in *Lopez* by requiring prior judicial authorization as a precondition of lawful electronic surveillance, even when one party has consented.

The Tenth Circuit has substantially agreed with the Seventh Circuit in *Doty* v. *United States* (10th Cir., June 4, 1968, Nos. 9031, 9032, 9033, 9035, 9036, 9037, 9038, 9034) (Appendix D, *infra,* p. 51). In *Doty* the Government introduced tape recordings of telephone conversations carried on between one of the defendants and an undercover investigator. The Court said:

> "We think the principles of Katz are applicable here. There is, to be sure, a factual difference between this case and Katz. We are unable to see any distinguishing difference between the placing of the eavesdropping device at one rather than at the other end of the telephone line over which the recorded conversation was

> communicated. The fact that the appellant's recorded conversation was with an undercover agent of the Government does not render it admissible. United States v. White, 7th Cir. 1968, F. 2d , March 18, 1968, Nos. 16021, 16022. But see Dancy v. U. S., 5th Cir. 1968, F. 2d , Feb. 1, 1968, No. 24611. Because no prior approval by judge or magistrate was sought or obtained, the search was unreasonable, and appellant Epps is entitled to a new trial without this evidence being used against her." (Appendix A, *infra*, p. 21.)

The Tenth Circuit thus explicitly followed the holding of the Seventh Circuit in the *White* case and explicitly refused to follow the conflicting decision of the Fifth Circuit in *Dancy*.[13]

There is thus a clear and direct conflict between the Fifth, Seventh and Tenth Circuits, and between the Seventh and Tenth Circuits and the Massachusetts Supreme Judicial Court, with respect to the Fourth and Fourteenth Amendments problem here presented.

The need for authoritative resolution of these conflicts has taken on an increased urgency as a result of this Court's recent ruling in *Lee* v. *Florida*, — U.S. —, 36 L.W. 4652 (June 17, 1968), holding that evidence obtained in violation of section 605 of the Federal Communications Act, 48 Stat. 1064, 1103, 47 U.S.C. § 605, is inadmissible in a state criminal proceeding.

The opinion of the Court left open the question of what degree of protection should be afforded a defendant where the other party gives "consent" to the police, or where the police listen in on a "regularly used" telephone. 36 L.W.

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[13] The Fifth Circuit has also refused to apply the *Katz* decision to electronic monitoring done with the consent of one party in *Dryden* v. *United States*, 3 Crim. L. Rep. 2028.

at 4653. But the Court did seem to recognize a *continuum* of protection rather than the "all or nothing" rule applied by the Massachusetts Supreme Judicial Court in this case.[14]

Now that this Court has mandated that the exclusionary rule shall apply in cases where section 605 is violated, it becomes even more important to define the scope of section 605's prohibition. Moreover, there have been important legal changes since the Court last spoke on the general issue of one-party consent in the context of section 605. In *Rathbun* the Court emphasized the fact that—

> "the regulations of the Federal Communications Commission which control the recording of telephone conversations presuppose that either party may record a conversation and declare that tariff regulations of telephone companies which bar the use of recording devices are unjust and unreasonable and so in violation of § 201 of the Federal Communications Act [citing *In the Matter of Use of Recording Devices in Connection with Telephone Service,* 11 F. C. C. 1033, 1053]." 355 U.S. at 110, footnote 7.

But the Commission has, since the decesion in *Rathbun,* promulgated a Regulation which now bars the use of eavesdropping or recording devices without the authorization "of all parties engaging in the conversation." 31 Fed. Reg. 3400, § 15.11 (filed March 3, 1966). While paragraph (b) of this Regulation would exempt the "operations of any law enforcement officers conducted under lawful authority," it appears clear that guidance is needed from this Court as to the meaning of the critical phrase "under lawful authority." It is petitioners' view that "lawful authority"

[14] For example, the Court noted that a "party-line user's privacy is obviously vulnerable, but it does not necessarily follow that his telephone conversations are completely unprotected by Section 605." 36 L.W. at 4653, footnote 5.

requires prior judicial approval of the sort obtained in *Osborn* but not obtained here.[15]

Furthermore, several state statutes regulating wiretapping and electronic eavesdropping have been interpreted as precluding consensual or participant monitoring. An Illinois statute prohibits the use of "an eavesdropping device to hear or record all or any part of any oral conversation without the consent of any party thereto." Ill. Ann. Stat., c. 38, § 14-2a (Smith-Hurd, 1963). The Supreme Court of Illinois has recently interpreted this statute as rendering inadmissible against a nonconsenting participant recordings made with another participant's consent. *People* v. *Kurth,* 34 Ill. 2d 387, 395 (1966). The Supreme Court of Pennsylvania has made a similar ruling with respect to a Pennsylvania statute which reads: "No person shall intercept a communication by telephone or telegraph without permission of the parties to such communication." *Commonwealth* v. *Murray,* 423 Pa. 37 (1966). There would seem to be a striking similarity between section 605 of the Federal Communications Act and the above-cited Illinois statute, insofar as each appears to refer to the permission of a single party ("the sender" in the federal Act and "any party" in the Illinois Act). Yet the Illinois Supreme Court interpreted the Illinois statute to require consent of both parties, a construction which, if applied to the federal statute, would render inadmissible recordings such as those employed in this case.

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[15] Compare the views expressed by the Commission in the area of radio eavesdropping. In a 1966 ruling the Commission noted that "[d]oubt was expressed as to whether most persons assume, or should assume, the risk that their conversations are being overheard or recorded by the use of such devices. . . . [W]e have decided that the objections to this view are well founded and that we should not sanction the unannounced use of listening or recording devices merely because one party to an otherwise private conversation is aware that the conversation is in fact no longer private." 31 Fed. Reg. 3397, 3398 (1966).

Thus we see a puzzling and disturbing conflict of opinion among Courts, scholars and government agencies with regard to a question of constitutional dimension and of statutory and regulatory interpretation. Nor is this the kind of conflict which will work itself out or that will have only limited effect. Every law-enforcement agency in the Country that uses electronic monitoring—and there are many —wants to know, and is entitled to know, whether prior judicial approval is required where one party consents. So long as this conflict continues unresolved, and so long as it remains unclear whether this Court's language in *Osborn* was merely precatory or was mandatory, law-enforcement agencies will continue to apply differing interpretations, and the fundamental rights of suspected citizens will vary with the fortuity of geography.[16] This case presents this Court with an appropriate occasion to clarify this important area of law enforcement.

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[16] This is the kind of area where any clear rule is better than the present confused situation. The requirement of prior judicial approval (except where pressing reasons make it unduly difficult) is not an onerous one for law-enforcement authorities. It is one that they have been living with for many years in the area of search and seizure. What is onerous, especially because it is so unnecessary, is the uncertainty of not knowing whether such approval will be held to have been required after it is too late to remedy the situation.

This confusion among law-enforcement officers is aptly illustrated by a case decided by the Supreme Judicial Court of Massachusetts just after its decision in this case. In *Commonwealth* v. *Maiani*, Mass. Adv. Sh. (1968) 837 (Appendix B, *infra*, p. 37), the District Attorney's office initiated a consensual telephonic recording, and then the next day sought a Court order to authorize the recording both retroactively and prospectively (indicated by the report of the trial judge when he certified the question to the Supreme Judicial Court). The Commonwealth argued that the police did not need a Court order at all, but an order was sought, albeit late, just as "insurance" (Report, No. 14044). The necessity for such confused and haphazard procedures would be eliminated with a clarification of the questions raised in the instant proceeding.

**Conclusion.**

For the foregoing reasons, petitioners respectfully request this Honorable Court to grant this petition for a writ of certiorari.

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## Appendix A.

ADVANCE SHEETS

OPINIONS OF THE SUPREME JUDICIAL COURT

COMMONWEALTH *vs.* JACK DOUGLAS & others.

Suffolk. March 4, 1968.—May 3, 1968.

Present: WILKINS, C.J., WHITTEMORE, CUTTER, KIRK, & SPIEGEL, JJ.

*Extortion. Small Loans Statute,* Validity. *Constitutional Law,* Due process of law. *Eavesdropping. Evidence,* Relevancy and materiality, Hostile witness, Leading question, Redirect examination, Telephone conversation, Acts and declarations of conspirator. *Practice, Criminal,* Voir dire.

Indictments tried in the Superior Court before *Forte,* J.

CUTTER, J. Douglas, Frank Celeste, Alexander Celeste, and Arthur J. O'Neill were indicted for various offences. Douglas and O'Neill were each charged with threats to extort. Alexander Celeste was charged with being an accessory before the fact to such threats. Frank Celeste and Alexander Celeste were each indicted for violation of G. L. c. 140, § 110, making it a crime for an unlicensed person to conduct a small loan business (see fn. 3). All four defendants were charged with conspiracy to extort. Frank Celeste was found not guilty on the conspiracy indictment, but the other three defendants were found guilty. Each defendant was found guilty of the other offences, listed above, with which he was charged.[1] The cases are before us under G. L. c. 278, §§ 33A–33G, as amended. On somewhat conflicting evidence the facts set out below could have been found. The

[1] The Commonwealth nol prossed certain other indictments tried with these cases. Alexander Celeste was found not guilty on two indictments charging threats to extort, and on an indictment for assault and battery. The transcript states that O'Neill, on the day he was sentenced in these cases, pleaded guilty to certain other indictments on which he also was sentenced. The record does not show these indictments to be related to the present cases.

jury were not required to believe, or to regard as controlling, other evidence, which might tend to reflect adversely on the testimony and the behavior of the Commonwealth's principal witness, Melvin Sacks (as a partner in his insurance firm and as an employee of the Celestes from October, 1965, to August, 1966).

No defendant held a State license to make small loans. See G. L. c. 140, § 96, as amended through St. 1962, c. 795, § 1 (see later amendment by St. 1967, c. 190). In September, 1963, Alexander Celeste lent $500 to Sacks, an insurance broker. Interest was to be at the rate of $25 a week (equivalent to 260% per annum). Payments were to be made to one or the other of the Celestes. Some of about eight payments of $25 were made to Alexander Celeste. The other payments were made to Frank Celeste at Sacks's place of business. The payments were not applied to the principal of the loan. Early in November, 1963, Sacks paid Alexander the $500 principal.

In November, 1964, Alexander Celeste again lent Sacks $500 on the same terms. Frank Celeste appeared about once a week to collect $25, and thirty-nine payments of $25 were made between November, 1964, and August, 1965 (a total of $975). During the period, O'Neill began to accompany Frank Celeste when he made collections. No payments were made directly to Alexander Celeste. Sacks did not deduct on his 1965 Federal income tax return any interest payments on this loan.

After these thirty-nine payments had been made, at a time when four or five $25 payments were due, Frank Celeste told Sacks to credit the amount to Frank's insurance account with the insurance firm in which Sacks was a partner with Malcolm Post. This credit involved about $175 for insurance premiums due. Sacks made no interest payments on the loan thereafter, at least until September, 1966.

Sacks closed or sold his insurance agency and for a time after late August, 1965, was unemployed. In October, 1965 (when Sacks, in accordance with his 1964 arrangement with Alexander Celeste, owed the $500 principal plus four or five interest payments), Sacks was told by Alexander Celeste in Frank Celeste's presence, that he could start working for the Celeste brothers at a used car lot ("New England Auto") in Dorchester. He said that they would "table" the loan, pending a later arrangement for paying it. Sacks worked for eight to ten months for New England Auto, was clerk of the corporation, did bookkeeping for it, and was a stockholder in the concern. Sacks left New England Auto in August, 1966, although he worked to some extent on their books for two months thereafter. There was testimony indicating disputes between the Celestes and Sacks concerning the latter's sales activities.

On August 24, 1966, Douglas reported to Alexander Celeste by telephone in Sacks's presence that there had been a call from the district attorney's office concerning Sacks. Sacks, at Alexander Celeste's house, told Celeste that the call was about money Sacks had borrowed from another lender. Sacks's testimony was that Celeste then hit him in the face, and kicked him in the stomach. See, however, the verdict that Alexander Celeste was not guilty of assault and battery (fn. 1). On this occasion, Alexander told Sacks "it was a cardinal sin to borrow money from another loan shark while owing one." Alexander also told Sacks that if he "knew what was good for . . . [his] wife and kids," he had better not say anything to anyone from the district attorney's office. On an earlier visit Alexander had shown Sacks two sticks of dynamite, and on this occasion said that he would not "think twice about blowing up" Sacks's house. Sacks also testified that he saw various victims "take a beating" in back of the Celestes' garage.

Sacks in fact had borrowed from one Zine and owed money to one Carbone. The latter, when called as a witness in the absence of the jury, claimed his constitutional privilege not to testify.

On August 25 or 26, 1966, Sacks was told by Douglas that he knew Sacks was leaving the employment of New England Auto, that Sacks "still owed some money, and that . . . [he would] have to make arrangements to pay it." Sacks had a similar talk with Frank Celeste and with Alexander Celeste. He also had a telephoned inquiry from Douglas who "asked . . . what . . . [Sacks] was doing about getting some money" and said, "You better have it. . . . [Y]ou should pay it, if you don't want any trouble." On September 1, Douglas called again and demanded money by the next weekend. On September 8, 1966, Sacks spoke by telephone with O'Neill and Douglas. O'Neill said, "If you don't want to get hurt, you'd better get some money . . . real fast." Douglas said, "[Y]ou are almost at the end of the road." On September 14, O'Neill told Sacks, "You'd better have some money or you could be put in the hospital for four or five weeks." That day Sacks gave O'Neill $300.

On September 19, Sacks's father withdrew $1,000 from a savings bank and gave Sacks a check for $1,000. Sacks cashed this and paid the proceeds to Douglas. Douglas reported to Sacks that he paid these proceeds to Alexander Celeste. Two days later Douglas asked for the balance. When Sacks replied that he could not get $1,000 "just like that," Douglas said, "When you feel that cold barrel [of a gun] to your head, you'd be surprised how many ways you can think of of coming up with some money." He added, "[Y]our kid must have a long walk . . . from school, and you wouldn't want anything to happen to her knee caps on the the way home, would you?" From early in September, Sacks received numerous telephone calls from Douglas substantially every day pressing for payment. Some of these

calls were to Sacks's house, but many went to Sacks's new place of employment in Quincy.

In September and early October, Sacks consulted an attorney, Mr. Jordan Ring, a neighbor. Mr. Ring then represented a client who had made an attachment on Sacks's house. Sacks wished to get this attachment removed so that he "could raise the money to pay Al Celeste." It was brought out in part on cross-examination, and expanded in redirect examination, that Sacks told Mr. Ring the story of the threats. He informed Mr. Ring that he had told a detective from the district attorney's office nothing, because he did not "want any harm to come to . . . [his] family and" himself. He informed Mr. Ring that he (Sacks) "would rather pay the money" than go to the district attorney's office in view of the risks. Mr. Ring "insisted that . . . [Sacks] go to the District Attorney's office."

On October 11 or 12, 1966, Douglas went to Sacks's place of employment and renewed his demands. Sacks told Douglas he had no money for him. Douglas replied, "I should bust you right in the face right now, but I am not going to. I'm going to see what I can do for you but you'd better have some money in the next day or so."

Sacks called Mr. Ring. Two detectives from the district attorney's office visited him on October 11, 12, and 15. With Detective McLean listening on an extension telephone, Sacks "called . . . Douglas back," apparently in response to a message left with Mrs. Sacks by Douglas. Douglas said, "I can get you a few more days. . . . I should have busted you this morning. You're a no-good . . . ." He also told Sacks that he had "better come up with the money."[2]

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[2] On October 12, Sacks had a conversation with Douglas about how much he then owed. He quoted Douglas as saying that "he had discussed with Al and Frankie [Celeste] and that they had figured [it] out to be $2,400, but that they would give me a break and

Sacks gave the police permission to install a tape recorder on his telephone line. On October 17, there was recorded one of many telephone conversations between Sacks and Douglas during this period. In this conversation Douglas made demands for payment. Mr. Ring, Sacks's attorney, heard the conversation, which originated with a call by Sacks, with the aid of a speaker attached to the recorder on which one "can hear what is being taped." He verified the accuracy of the tape, which was received in evidence, after an extended voir dire. Douglas admitted that the recorded voice was his. The machine "was not telephone equipment." It was installed without the participation or consent of the telephone company, without any judicial authorization, and without Douglas's knowledge. The tape recorder gave off no "beeps" which would inform a person on the line that it was operating. The first machine did not work and it was replaced prior to October 17. This, so the detective who installed it testified, was not a "wire tap," because the machine was installed with the permission of Sacks, the telephone subscriber.

On October 17, Sacks paid to Douglas five $10 marked bills. Sacks was then wearing an electronic device. No tape was procured, however, because the device did not function. On that day the Celeste brothers, O'Neill, and Douglas were arrested.

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make it $2,000." At least the amount of the payments in excess of the $500 originally borrowed by Sacks from Alexander Celeste appears to have been interest, referred to by various witnesses as "vig" or "juice." In the recorded telephone talk of October 17 mentioned in the text, Douglas demanded that Sacks "come up with the vig" and that he "start paying juice." Explanation by Sacks and others of the meaning of these slang expressions was admissible, if judicial notice could not be taken of the meaning. See *Crafts* v. *McCobb*, 303 Mass. 172, 175; *United States* v. *Prochaska*, 222 F. 2d 1, 2–3 (7th Cir.) cert. den. 350 U. S. 836; *People* v. *Knott*, 52 Cal. App. 2d 439, 441–442; Wigmore, Evidence (3d ed.) § 2582.

1. The Celeste brothers contend that G. L. c. 140, § 110, as amended through St. 1962, c. 795, § 2[3] (see later amendment, St. 1967, c. 196, increasing the penalties), is void for vagueness and that the two indictments, charging them with violations of § 110, should have been dismissed because they failed to inform them with sufficient clarity of the offence charged. We perceive no such infirmity in the section or in the indictments.

The Legislature may prohibit and make criminal the unlicensed granting of small loans. It may recognize "the danger that such a business . . . [may] be conducted oppressively" and the desirability of furnishing a "degree of protection to [small] borrowers." *Dewey* v. *Richardson,* 206 Mass. 430, 432. *Goodowsky* v. *Rubenstein,* 225 Mass. 448, 450–451 ("The statute [as it stood prior to St. 1913, c. 347, § 2] does not prohibit all such loans except by licensed persons," but "forbids the making of such loans as a business unless one is licensed. The making of a single loan might be sufficient . . . [in] appropriate circumstances

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[3] Section 110 as in force in 1963 and 1964, reads: "Whoever, not being duly licensed as provided in . . . [§ 96] on his own account or on account of any other person not so licensed, engages in or carries on, directly or indirectly . . . the business of making loans . . . to which . . . [§§ 96–111] inclusive, apply, shall be punishable by a fine of not more than . . . [$5,000] or by imprisonment for not more than two years, or both. Any loan made . . . by an unlicensed person in violation of said sections shall be void. [A] In any judicial proceedings under said sections the fact that the defendant has made or assisted in the making of two or more loans of three thousand dollars or less, upon which there has directly or indirectly been paid or charged, for interest . . . or other expenses, a sum which exceeds in the aggregate an amount equivalent to twelve per cent per annum upon the amount actually received by the borrower, whether such sum has been paid to or charged by the defendant or . . . any other person, shall be prima facie evidence that the defendant has engaged in and carried on the business of making loans to which" §§ 96–112 apply. The letter in brackets has been inserted for convenient reference to the sentence following it.

to warrant a finding that the one making the loan was carrying on the business. But it does not require such a finding"). See *Commonwealth* v. *Silverman,* 220 Mass. 552, 554–555. The section, taken with other sections to which it refers, is adequate "to convey to a person of ordinary understanding . . . [a] description of the prohibited act." See *Jaquith* v. *Commonwealth,* 331 Mass. 439, 442. All rational presumptions are to be made in favor of its validity. See *Commonwealth* v. *Finnigan,* 326 Mass. 378, 379. There is in § 110 no such vagueness as was considered in *Alegata* v. *Commonwealth,* 353 Mass. , – , – , but see pp. – .* The final sentence of § 110 (see fn. 3, at point [A]) in specific terms defines what is sufficient to create a prima facie case of violation by apt reference to at least one set of facts having a rational tendency to show the conduct of a business. Provisions of this type are valid. See *Meunier's Case,* 319 Mass. 421, 425–426. See also *Commonwealth* v. *Williams,* 6 Gray 1, 4–8; *Commonwealth* v. *Spindel,* 351 Mass. 673, 676–678. Proof of two small loans within a reasonable period of time, at a rate of more than twelve per cent per annum, supports the conclusion that the lender was in the business of making such loans. Loans made to friends, or as a matter of charity, are not often effected upon such terms or in such circumstances.

2. The defendants argue various exceptions concerning the evidence received of telephone conversations between Sacks and Douglas. Detective McLean, on an extension line in Sacks's house, listened to one or more such conversations. Mr. Ring (with the aid of a speaker attached to a tape recorder) listened to another. This latter talk, with Sacks's permission, was recorded on a tape. There was no violation of G. L. c. 272, § 99 (as amended by St. 1959,

* Mass. Adv. Sh. (1967) 1457, 1464–1466, 1468–1470, but see pp. 1471–1473.

c. 449, § 1),[4] which creates the crime of eavesdropping. Section 99 is supplemented by § 101. Each conversation was overheard with the consent of Sacks, "a sender or receiver" within § 99 (fn. 4). Section 101 (as amended by St. 1956, c. 48, § 4),[5] merely makes certain conduct prima facie evidence of violation of § 99, but there is no violation where a sender or receiver has given consent to that conduct. The case thus is unlike *Commonwealth* v. *Spindel,* 351 Mass. 673, 675, where "[t]here was no evidence that . . . [any person participating in the conversation] consented to . . . monitoring." We need not consider whether the tape recorder was a "device" which Sacks, as owner of his house and "on premises under his exclusive control" (see § 101,

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[4] Section 99 reads, in part: "Whoever, except in accordance with an order issued as provided herein, secretly *or without the consent of either a sender or receiver,* overhears or attempts secretly, or without the consent of either a sender or receiver, to overhear . . . or permit, or to have any other person secretly, or without the consent of either a sender or receiver, to overhear any spoken words at any place by using any electronic recording device, or a wireless tap or electronic tap, or however otherwise described, or any similar device or arrangement, or by tapping any wire to intercept telephone communications, shall be guilty of the crime of eavesdropping and shall be punished by imprisonment . . . or by a fine . . . or both" (emphasis supplied). The remaining provisions of § 99, dealing with the issuing of judicial orders for use of various devices, need not now be considered. No such order was issued.

[5] Secton 101 reads, in part: "Proof of the installation in any building of any device or arrangement which may be used for the purpose of violating the provisions of . . . [§ 99] by listening to any spoken words or proof of the tapping of any wire, *unless duly authorized* and *unless done with the consent of the owner or person in control of the building,* shall be prima facie evidence of the commission of the crime of eavesdropping; but nothing contained in this section or . . . [§§ 99 and 100] shall render it unlawful for any person to install and use such a device on premises *under his exclusive control*" (emphasis supplied).

fn. 5), could install and use in any event. See the *Spindel* case, 351 Mass. 673, 677.

In *Rathbun* v. *United States,* 355 U. S. 107, 109–111, there was found no interception of the type then and now forbidden by 47 U. S. C. § 605 (1964). The court approved the admission in evidence of conversations overheard by police on a regularly used extension telephone with the consent of the telephone subscriber, a party to the conversation. A defendant who speaks incriminating words over the telephone runs the risk that the person with whom he talks may be an informer (see *Hoffa* v. *United States,* 385 U. S. 293, 302–303) or that the conversation (as in the *Rathbun* case) may be overheard on an extension telephone. In the interests of sound law enforcement, in these days when telephone talks often supplant face to face encounters, he also should be held to take the risk that his words may be recorded by his listener. See *Lopez* v. *United States,* 373 U. S. 427, 437–440 (tape admissible of a personal interview during which a bribe was attempted). In the present case there was, of course, no such prior judicial authorization of the use of a recording device as in fact took place in *Osborn* v. *United States,* 385 U. S. 323, 327–331. There was no occasion in the *Osborn* case for the Supreme Court of the United States to consider again the broad issue presented and decided in favor of admissibility in the *Lopez* decision, 373 U. S. 427, 437–440. There was no reason for such prior approval. The present case was not one of surreptitious placing of a recording device in another's office (see *Berger* v. *New York,* 388 U. S. 41, 44–45), or in a position enabling third persons to overhear, without the consent of any party to the telephone conversation, a private call made from a public telephone booth. See *Katz* v. *United States,* 389 U. S. 347, 354–359.

In the case at bar, there was at most a recording of telephoned threats, themselves constituting the commission of a

crime, made to the victim of the crime and of continued unlawful harassment. The victim, himself a participant in the conversation, consented to the recording. He was sitting in his own house, at his own telephone, with his own attorney listening to the conversation. If it be relevant (see *Lewis* v. *United States,* 385 U. S. 206, 210–212), Sacks was not an informer committing a breach of confidence, and could be found to have been a victim of extortion. See *Dryden* v. *United States,* F. 2d (5th Cir.—recorder on extension telephone).[ab] Cf. *United States* v. *White,* F. 2d , [b] (7th Cir.—electronic device on informer), a case which seems inconsistent with the Supreme Court decisions already cited.

No illegal search or other violation of any constitutional or statutory provision made the recording inadmissible. See *Glacy* v. *United States,* 361 F. 2d 31, 35–36 (1st Cir.), cert. den. 385 U. S. 831; *Harris* v. *United States,* 367 F. 2d 633, 635 (1st. Cir.), cert. den. 386 U. S. 915. Any other conclusion, we think, would give members of the underworld carte blanche to intimidate (or otherwise to engage in criminal conduct injurious to) innocent members of the public over the telephone, without risk that their words could be overheard or recorded (even with the consent of the victims) in a manner which would be used against the offenders in a court. See *Schwartz* v. *Texas,* 344 U. S. 199, 203; *Pugach* v. *Dollinger,* 277 F. 2d 739 (2d Cir.) affd. 365 U. S. 458; *United States ex rel Griffin* v. *Hendrick,* 360 F. 2d 614 (3d Cir.). Cf. *Nardone* v. *United States,* 302 U. S. 379, 382–385; 308 U. S. 338, 340–341; *United States* v. *Dote,* 371 F. 2d 176, 180–181 (7th Cir.).

3. There is no merit in the defendants' contention that the judge improperly received evidence of (a) a September,

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[ab] 3 Cr. L. Rep. 2028.

[b] 36 U. S. L. Week 2613.

1963, conversation[6] between Sacks and Alexander Celeste occurring prior to the period (October 15, 1963 to October 18, 1965) mentioned in the indictment as explained by particulars, and (b) a loan transaction which took place in part before that period.

As to Alexander Celeste, the conversation in September, 1963, related to a loan transaction the execution of which, by the collection and payments of interest and principal, continued well into the period covered by the indictment, and shed light on Celeste's activities during the period, including payments on the 1963 loan and the making and collection of the later loan. The evidence was relevant. See *Commonwealth* v. *Stasiun,* 349 Mass. 38, 46–47. Cf. *Commonwealth* v. *Runge,* 231 Mass. 598, 600.

The somewhat ambiguous evidence of Edwin Small concerning a 1966 loan to him by Alexander Celeste, at most tended to explain other activities of Alexander Celeste within the indictment period, if, indeed, the evidence was sufficiently definite or comprehensible to have any probative effect whatsoever. There was ample indication that Small was a hostile witness. It was not error to permit the prosecution (which had called him) to ask him leading questions. *Commonwealth* v. *Monahan,* 349 Mass. 139, 162–163. *Commonwealth* v. *Soroko,* 353 Mass. , .[c]

4. Similarly without merit is the contention that Sacks was not competent to testify concerning what was done (in

[6] The jury were told that the conversation was admitted only against Alexander Celeste. In any event, verdicts of not guilty were directed on indictments charging O'Neill and Douglas with violations of G. L. c. 140, § 110. The Commonwealth nol prossed indictments charging them with conspiracy to violate § 110. Even if we were to assume that they have standing to argue the admissibility of this evidence, they were not harmed by it, for the evidence as to them would have been relevant substantially only with respect to those indictments.

[c] Mass. Adv. Sh. (1967) 1417, 1421.

crediting payments to principal or interest) with the payments made on the 1963 loan. Sacks, as the debtor under that arrangement, could reasonably conclude (where weekly payments remained constant at $25 a week, and were followed by a single payment of the $500 amount of the original loan) that the earlier payments had been applied as interest. Sacks's conclusions were consistent with the terms of the agreement imposed on him by Alexander Celeste.

5. The judge did not abuse his discretion when he refused to permit Sacks to be cross-examined concerning a conversation with Orlando J. Carbone, a witness later called by Douglas. The conversation had taken place in January, 1967, during the trial of these cases. The judge, as the evidence then stood, reasonably regarded this inquiry as irrelevant to the issues raised in the indictments. At a bench conference, the judge excluded the line of questions until such time as some other evidence showed the inquiry to be relevant.[7] The assistant district attorney stated that he would produce Sacks for further cross-examination on a day's notice, if evidence later showed the inquiry to be relevant, and not merely to relate to a collateral matter.

When Carbone later took the stand, it was represented to the judge that the witness would claim his privilege not to testify because of the possibliity of self-incrimination. The judge conducted a voir dire, in the absence of the jury, and, except in answering questions concerning his name, address, and employment, Carbone claimed his privilege. Douglas's counsel then said, "I submit that there would be no further purpose in inquiring of the witness." An exception claimed prior to the voir dire (to the judge's state-

[7] Douglas, the only defendant to take the stand, later testified in effect that he had interceded with Carbone in behalf of Sacks in order to persuade him not to press Sacks for payment of a loan made by Carbone and that he had only pressed Sacks to pay Alexander Celeste $200 owed by Sacks. The jury, of course, was not required to believe this testimony.

ment that he would not let the witness identify himself and claim his privilege in the presence of the jury until he heard the voir dire) was not renewed by the defendants after the voir dire. It was within the judge's discretion to hold a voir dire to ascertain whether inquiry in the presence of the jury would be prejudicial to the defendants or productive of relevant testimony. No objection or exception to what the judge did intelligibly raised the issue (see *Commonwealth* v. *Baker,* 348 Mass. 60, 63; cf. *Murphy* v. *Commonwealth,* 353 Mass. , ,[d] whether the witness was being afforded too broad a protection based upon his privilege.

6. Sacks's testimony on redirect examination about what he told his attorney, Mr. Ring, was with respect to a matter opened up on cross-examination by inquiry about (a) what Sacks had told the attorney, and (b) what he had or had not told to the district attorney and to certain police officers when he had opportunity to talk to them. There may have been some indication that the defendants were claiming Sacks's story to be recently contrived. See *Commonwealth* v. *Heffernan,* 350 Mass. 48, 51–52. In any event, this testimony on redirect examination was reasonably permitted by the trial judge, as matter of discretion, in explanation of Sacks's testimony on cross-examination about (a) his failure to make more prompt reports concerning the threats to the district attorney and to the police, and (b) his conversation with Mr. Ring. See *Commonwealth* v. *Galvin,* 310 Mass. 733, 747. See also *Commonwealth* v. *Binkiewicz,* 342 Mass. 740, 758; *Commonwealth* v. *Gardner,* 350 Mass. 664, 668–669.

It is irrelevant that this testimony incidentally tended to show that the defendants may have committed other offences, e.g. by intimidating other persons. The testimony was pertinent in that it tended to explain fears which led to Sacks's failure to report to the authorities the threats

[d] Mass. Adv. Sh. (1968) 485, 486–488.

made to him and his delay in letting Mr. Ring do so. All this became of significance because of matters brought out on cross-examination. See *Commonwealth* v. *Feci,* 235 Mass. 562, 567; *Commonwealth* v. *Gettigan,* 252 Mass. 450, 459–460. Similar principles apply to cross-examination (permitted within the judge's discretion) of a witness (Post) concerning an assault upon him by O'Neill, in an effort to test Post's credibility by showing that he feared O'Neill. This was not a case where the prosecution sought to introduce, through a witness called by it, evidence of other crimes to prove commission of the particular crimes charged. Cf. *Commonwealth* v. *Stone,* 321 Mass. 471, 473; *Commonwealth* v. *Welcome,* 348 Mass. 68, 70–71.

7. The defendants contend that testimony by Sacks concerning certain telephone conversations was admitted without prior proof that Sacks was able to identify the voice of the speaker. Objections were made and exceptions saved but without pointing out to the trial judge that the identification of the voice was the ground of any excepiton. There was no specific objection (see *Irving* v. *Goodimate Co.* 320 Mass. 454, 460) based on the issues discussed in *Bond Pharmacy, Inc.* v. *Cambridge,* 338 Mass. 488, 490–491, and *Chartrand* v. *Registrar of Motor Vehicles,* 345 Mass. 321, 325. Sacks testified that he had received a call from Douglas. This reasonably implied that he recognized the latter's voice.

The conversations were relevant. There was also sufficient proof of coöperation by all the defendants in pressure on Sacks concerning the collection of the loans to him to warrant the judge's preliminary conclusion that there was a prima facie case of conspiracy permitting evidence of the acts and declarations of one conspirator in pursuance of the common object to be admitted against the others. See *Commonwealth* v. *Stasiun,* 349 Mass. 38, 50–51, and the cases there reviewed.

8. There was ample evidence from which it could be found that the Celestes made, or acted with respect to, two loans in violation of G. L. c. 140, § 110, which were either made or paid within the period mentioned in the indictments and particulars. The evidence, as a whole, showed that the second loan to Sacks in November, 1964, was not a friendly or charitable act, but entered into for profit. Taken with the earlier loan, on the same terms, which was not paid until November, 1963, and with the testimony of widespread harassment and coercion to effect collection of the second loan, the evidence warranted the jury in concluding that (as to Sacks, at least) the Celestes were in the business of making such loans.

There was direct evidence of Douglas's and O'Neill's threats made to Sacks to enforce payment of the unconscionable and illegal 1964 loan. It could be reasonably inferred that the threats were made at the behest of Alexander Celeste, by his employees and in his interest. The evidence already summarized permitted the jury to conclude that, in exerting the pressures upon Sacks, all the defendants were acting in concert as conspirators to extort.

There was no error in refusing to direct verdicts for the defendants.

9. Other assignments of error already have been covered adequately or do not merit discussion.

*Judgements affirmed.*

*John P. White, Jr.,* for the defendant O'Neill.

*David S. Nelson* for the defendant Douglas, *Joseph S. Oteri* for the defendant Alexander Celeste, *& Monroe L. Inker* for the defendant Frank Celeste, joined in a brief.

*Murray P. Reiser,* Assistant District Attorney (*Roger Michael Carey,* Legal Assistant to the District Attorney, with him), for the Commonwealth.

## Appendix B.

ADVANCE SHEETS

OPINIONS OF THE SUPREME JUDICIAL COURT

COMMONWEALTH *vs.* EDWARD MAIANI & others[1]

(and eight companion cases).

Suffolk. May 6, 1968.—May 31, 1968.

Present: WILKINS, C.J., SPALDING, CUTTER, SPIEGEL, & REARDON, JJ.

*Eavesdropping. Evidence,* Telephone conversation.

Report by *Moynihan,* J., in cases in the Superior Court.

CUTTER, J. The defendants were each indicted for (a) conspiracy to conduct a small loans business without a license in violation of G. L. c. 140, § 110 (as amended through St. 1962, c. 795, § 2; see later amendment by St. 1967, c. 196), and (b) violation of § 110. Maiani is also charged with extortion and he, Nazzaro, and Castucci are charged with conspiracy to extort. Each defendant filed a "pre-trial motion to suppress the use in evidence of certain telephone conversations, recordings" of such conversations, and other evidence "obtained by or as the result of a wire-tap or by means of an electronic or other . . . recording device." The trial judge, without decision, on December 11, 1967, reported the motions (G. L. c. 278, § 30A) upon findings which adequately present the question of law whether he should allow the motions to suppress the evidence of the recorded telephone conversations between the defendants and Austin Mortensen.[2] This resport was made before our recent de-

[1] Other defendants are Richard Castucci, William Cafasso, Michael Nazzaro, and Guy Lauria. There were nine separate indictments.

[2] He first reported two other questions: (a) whether G. L. c. 272, § 99, is void on its face as in violation of the Fourth and Fourteenth Amendments to the Constitution of the United States, and the Constitution of the Commonwealth; and (b) whether an order of March 2, 1967, referred to in the text of the opinion was valid.

cision in *Commonwealth* v. *Douglas, ante,* .[2]

Upon evidence presented at the pre-trial hearing on the motions to suppress, the trial judge found the following facts: Mortensen resided in Somerville with his wife and children. During the latter part of February, 1967, and on March 1, 1967, Mortensen complained to police officers of telephone calls to his house in Somerville threatening him with bodily harm. He stated that he had received numerous calls from Maiani, Nazzaro, and Lauria demanding the repayment of illegal loans made to him. Mrs. Mortensen stated that she had received telephone calls from unknown persons ordering her to tell her husband to pay the money owed by him on loans. Mortensen requested the police to attach a device to record conversations on his house telephone.

On March 1, 1967, two Boston police detectives, Paul R. McLean and John Doyle, attached to the staff of the district attorney for Suffolk County, went to Mortensen's house and connected a recording device to his telephone.[3] "The entire mechanism . . . [was] installed . . . with . . . [Mortensen's] consent . . . and . . . [he] authorized the police to listen to all conversations that were transmitted through his telephone during the time the conversations were being . . . recorded." After the device was installed, Mortensen called Maiani and had a conversation with him.

The recording device remained attached to the Mortensen telephone for eight or nine consecutive days and during that period all incoming or outgoing calls were recorded, includ-

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[2] Mass. Adv. Sh. (1968) 641.

[3] At first the device consisted of a suction cup induction coil attached to the receiving end of the telephone hand set and connected to a tape recorder. At some later time Detective McLean removed the suction cup from the hand set and replaced it with two clips attached to the telephone wire.

ing conversations with Maiani and Nazzaro. The tapes on which these conversations were recorded were subsequently transcribed by the police.

On March 2, 1967, an assistant district attorney made application to a judge of the Superior Court for an order under G. L. c. 272, § 99, as amended by St. 1959, c. 449, § 1,[4] authorizing the district attorney, and any of his assistants, police officers, or other persons acting under his direction, to intercept communications on the Mortensen telephone, "beginning March 1, 1967, and for three months thereafter." The requested order was issued on March 2, 1967.

1. Our decision in the *Douglas* case, *ante,* ,[b] controls the present cases. The defendants make no contention that the Commonwealth proposes to introduce evidence of any telephone conversations to which Mortensen was not a party or which he did not consent to have intercepted and recorded. Thus the facts appear to be very closely like those in the *Douglas* case, which also involved both loans made in violation of G. L. c. 140, § 110, and threats to extort.

The principal difference between these cases and the *Douglas* case is that in the present cases a court order under § 99 in fact was obtained, whereas in the *Douglas* case no such order was sought or issued. That difference is immaterial.

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[4] The first part of § 99 is quoted in the *Douglas* case, *ante,* , , fn. 4 (Mass. Adv. Sh. [1968] 641, 648). It is provided in the later portions of the section that an order authorizing listening of a type otherwise prohibited by the section "may be issued . . . by any justice of the . . . superior court upon application of . . . a district attorney for the district verified by his oath . . . that there are reasonable grounds to believe that evidence of crime may thus be obtained." The section provides in some detail the procedure to be followed in connection with such an application and order.

[b] Mass. Adv. Sh. (1968) 641.

2. For reasons fully stated in the *Douglas* case, *ante*, , – ,[c] no order was necessary under § 99, which has no application to listening or recording with "the consent of either a sender or receiver" of the conversation. Mortensen, obviously acting for his own protection from threats and attempted coercion, consented to the recording of his conversations and the attachment of the device to his telephone. It is fairly to be implied from the subsidiary facts stated that Mrs. Mortensen also consented. It is not shown that any conversations over Mortensen's telephone with any persons other than Mortensen or his wife were to be offered in evidence. If other persons used the telephone, we think that would not affect the consent to the recording of conversations with any of those persons who gave consent, or the use in evidence of conversations in which they participated.[5] Because § 99 was not violated, we have no occasion to consider now whether the procedure for issuing orders contained in c. 272, § 99 (see also the related provisions of §§ 100–101 as amended), is valid.

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[c] Mass. Adv. Sh. (1968) 641, 647–648.

[5] As stated in the *Douglas* case, *ante* (Mass. Adv. Sh. [1968] 641, 648–650), we do not regard recent decisions of the Supreme Court of the United States as precluding introduction in evidence of a recording of a telephone conversation, made with the consent of one participant to protect him from telephoned criminal threats and attempted extortion. See e.g. *Rathbun* v. *United States*, 355 U. S. 107, 109–111; *Lopez* v. *United States*, 373 U. S. 427, 437–440; *Osborn* v. *United States*, 385 U. S. 323, 327–331; *Berger* v. *New York*, 388 U. S. 41, 44–45; *Katz* v. *United States*, 389 U. S. 347, 354–359. Cf. Greenawalt, The Consent Problem in Wiretapping: Surreptitious Monitoring with the Consent of a Participant in a Conversation, 68 Col. L. Rev. 189, which seriously underestimates the public interest and the interest of a victim of telephoned threats and extortion in recordings as a method of preventing such criminal action. One who invades the privacy of another by telephoned threats cannot be heard to complain that his own privacy has been invaded by recording his threats as a protective measure.

3. For the reasons stated in the *Douglas* case, *ante*, , – ,[d] we think that there was no violation of 47 U. S. C. § 605 (1964). On this question the cases appear to be governed by *Rathbun* v. *United States*, 355 U. S. 107, 109–111, and *Dryden* v. *United States*, F. 2d (5th Cir.).[e] Cf. *United States* v. *White*, F. 2d (7th Cir.).[f]

4. Two questions (see fn. 2) need not be answered. The third and principal question (discussed at length above) is to be answered that there is no occasion to allow the defendants' motions to suppress.

*So ordered.*

*Harvey A. Silverglate* for the defendant Castucci.

*Jack I. Zalkind*, Assistant District Attorney (*Roger M. Carey*, Legal Assistant to the District Attorney, with him), for the Commonwealth.

*Joseph S. Oteri* for the defendant Maiani & *John P. White, Jr.*, for the defendant Cafasso, joined in a brief.

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[d] Mass. Adv. Sh. (1968) 641, 648–650.

[e] 3 Cr. L. Rep. 2028.

[f] 36 U. S. L. Week 2613.

## Appendix C.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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SEPTEMBER TERM, 1967—JANUARY SESSION, 1968

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Nos. 16021-16022

UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*
v.
JAMES A. WHITE,
*Defendant-Appellant.*

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

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March 18, 1968

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Before *Senior Circuit Judge* MAJOR, SCHNACKENBERG and CASTLE, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* James A. White, defendant, appeals from a judgment following trial by jury, adjudging him guilty of violating 26 U.S.C. § 4705 (a) and 21 U.S.C. § 174. According to his counsel's brief, defendant was sentenced to a total imprisonment of 25 years and to pay a total of $35,000 in fines.

Foremost among errors relied upon are those said to arise out of interceptions of telephone and radio transmissions and the surreptitious placing of a radio transmitter on the person of a government informer during the time that he was conversing with defendant in various locations.

The government's evidence tended to prove the following events which are typical of other episodes not set forth herein.

On December 9, 1965, Harvey Jackson, a government informer, met defendant in the kitchen of the informer's home. He had concealed on his person a Kel radio transmitter. While narcotics agent Carl Jackson was concealed in a kitchen closet, he overheard a conversation between Harvey Jackson and defendant, and observed defendant give a package to Harvey. The package contained heroin. The closet had two doors which the agent left ajar so that he could see defendant and the informer, who asked the number of ounces in the package, and defendant said "one good ounce". Defendant added that he would come the next day for the money. Narcotics agent DeFauw overheard this conversation through a receiver.

The next day agent Jackson was again in the closet, from which he observed Harvey and defendant count $1,000, in official funds previously given Harvey by agent DeFauw, which defendant put in his pocket. Agent Jackson also heard defendant tell the informer he would get more "stuff" on December 14 and arrange to meet the informer at 6 p.m. the next day at Lake and Wells streets for further payment. DeFauw overheard that conversation by receiving radio transmissions from a Kel transmitter previously concealed on the informer's person.

On December 14, 1965, DeFauw placed the Kel set on the informer's person, furnished him with $360 and followed him to the residence of defendant. DeFauw overheard by radio receiver a conversation between defendant and the informer, in defendant's house, in which the money was counted and arrangements made for defendant to sell the informer another two ounces of "stuff" on December 16, for $1250, with payment due within a week and a half after delivery. Defendant said he wanted the money faster, as the "Dagoes" wanted their money sooner. Arrangements were made to meet a 6 o'clock on December 16.

On December 16, 1965, DeFauw placed the Kel set under the informer's clothing and followed him to Clark and Wacker streets, where the informer Jackson met defendant, who entered informer's car. Agent DeFauw, following them in his car, overheard their conversation about the price and quality of heroin by radio receiver. Thereafter the informer left the car, as defendant said he had to meet "this man". Defendant drove the car to State and Randolph streets, where he picked up Sam Minerva, who rode for one-half block. From State and Randolph streets, agent Kerstann followed defendant to Lake and Wells streets, where the informer re-entered his own car. Kerstann by radio receiver overheard defendant say he had met "this man" and would leave the package on the seat. Defendant left the car. Kerstann entered the informer's car and the informer pointed to a package which contained heroin.

On December 28, 1965, DeFauw again placed the Kel set under the informer's clothes and gave him $1250. DeFauw followed agent Jackson and the informer to the latter's residence where *agent Jackson concealed himself in the closet. Defendant later arrived and asked if the informer had the money and they counted out $1250. The informer asked for more "stuff" and defendant said he could get some the next day, but he had to have the money faster as the Dago wanted fast delivery of money.*

*From the closet agent Jackson overheard this conversation and observed the transfer of money. Agent DeFauw listened by radio receiver.*[1]

On December 29, 1965, agents Connolly and Lewis followed defendant from his residence and into a tavern at 225 North Clark Street, where defendant talked briefly to

[1] The foregoing italicized language is taken from the statement of facts, which the evidence tended to prove, included in the brief filed by appellant.

Harry B. Williams. Connolly saw him go to a nearby Hyman's Clothing Store. Williams then left. Defendant, observed by agents, left Hyman's and drove to State and Randolph Streets where he picked up Minerva who rode for one-half block. Minerva was carrying a white shoe box. When he left the car he was carrying a black brief case. One block later defendant picked up Williams. Meanwhile the informer, equipped with a Kel transmitter, had entered said tavern. Defendant and Williams returned to the tavern. Defendant entered, Williams remaining in the car. Defendant talked to the informer and drove to Lake and Wells Streets. The informer followed. Defendant walked to the informer's car and handed him a sack. Over the radio, Meyer heard defendant ask the informer to take Williams south to Kimbark Avenue and Midway Plaisance. The informer did so. Williams was also carrying a brown paper bag. At 62nd Street and Drexel Avenue the informer gave agent DeFauw a brown paper sack. It contained heroin.

On January 5, 1966, DeFauw placed the Kel set on the informer and gave him $1300. Agent Jackson concealed himself in the kitchen closet of the informer's home. He observed defendant and informer count the money. Defendant told the informer to bring the "remaining $950" to his restaurant, the Dining Room Aluminer. DeFauw heard the conversation by Kel receiver. Defendant wanted the informer to purchase large sums of heroin and to pay in advance.

On January 7, 1966, the informer was in company with agents DeFauw and Kerstann at 59th Street and Stony Island Avenue. DeFauw placed the Kel set on the informer, gave him $950 and followed him to defendant's restaurant which the informer entered. DeFauw heard over his receiver defendant tell the informer that the price of heroin

was going up, and to meet him at Lake and Wells and defendant would get three "things" for $2500.[2]

On January 8, 1966, at 6 p.m. DeFauw saw Minerva standing at State and Randolph Streets. Defendant drove up, stopped, opened the door, and Minerva approached the car. Defendant said "come on, man, give me the package, I've got to get out of here." Minerva handed a brown leather briefcase into the car and said he would pick up the money later. DeFauw placed defendant under arrest and seized the briefcase. It contained heroin.

Early in the trial, when agent Jackson testified that he listened in on a telephone conversation between the informer and defendant, objection by the defense was made on the ground that such interception was a violation of the law of Illinois, as well as the federal constitution and law, but the objection was overruled.

Also the defense objected when DeFauw testified about receiving radio transmissions from the transmitter concealed on the person of the informer. The objection was overruled. At the conclusion of the government's case, a motion by the defense to strike various radio conversations and transmissions to which the various agents testified, on the ground that they were in violation of the Illinois Eavesdropping Statute, and the state's public policy, as well as the fourth and fifth amendments to the federal constitution, was denied by the court.

1. Defendant was convicted of the possession and sale of narcotics largely as a result of the testimony of federal narcotics agents that they heard defendant make self-incriminating statements, which had been transmitted over the air by an electronic device hidden under the informer's

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[2] Witness DeFauw was given his report to refresh his recollection. The record shows that this report was given to defense counsel when he started a cross-examination of DeFauw.

clothes. Thereby the agents heard conversations taking place in defendant's home, his car, his place of business, as well as in the informant's house and car. The evidence clearly shows that by these means government agents were able to, and did, testify to what they thus heard, including admissions by defendant. Informer Jackson did not testify at the trial. There is no contention that the government relied on any warrant or court order.

In *Katz* v. *United States,* 389 U.S. 347 (1967), the Supreme Court reversed a conviction obtained after a trial during which the government had introduced defendant's telephone conversation overheard by federal agents through a device they had attached to the outside of a public telephone booth. In the absence of a proper warrant or judicial order, surveillance was held to be "per se unreasonable under the fourth amendment" even though the F.B.I. investigation activities established "a strong probability" that defendant was violating federal law.

The importance of the *Katz* holding we pointed out in *United States* v. *Hagarty,* No. 15881 (January 11, 1968):

> "* * * Thus the Government first urges that Nasser's government office was not a constitutionally protected area. A similar argument with respect to the public telephone booth was rejected in *Katz,* where Mr. Justice Stewart pointed out that 'the Fourth Amendment protects people, not places,' and that what a person 'seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.' The key is whether defendant sought to exclude 'the uninvited ear.' Under this rationale, it is immaterial that the overheard conversation took place in an IRS office. The Fourth Amendment applies 'Wherever a man may be * * *.' 36 U.S. Law Week at 4081, 4083."

In the case at bar, the well-laid plans of the government agents were obviously made because the government recognized that defendant sought to exclude the "uninvited ear". For instance, why would it have hired informer Jackson, placed upon his person a hidden radio transmitter, and concealed agent Jackson in a kitchen closet of the home of the informer and thereby arranged to have a conversation between the informer Jackson and defendant overheard by agent Jackson?

By the particular means of surveillance used, it seems to us patent that the government recognized that defendant's rights under the fourth amendment, as declared in the rulings of the United States Supreme Court, had to be respected. We now apply the principles announced by the Supreme Court in its recent pronouncement in *Katz* to the situation here presented. At 353, the court said:

> "* * * once it is recognized that the Fourth Amendment protects people—and not simply 'areas'—against unreasonable searches and seizures, it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.
>
> "* * * The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment. * * *"

At 357, the court added:

> "* * * Searches conducted without warrants have been held unlawful 'notwithstanding facts unquestionably showing probable cause,' * * * and that searches conducted outside the judicial process, without prior

approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.

"* * * Even electronic surveillance substantially contemporaneous with an individual's arrest could hardly be deemed an 'incident' of that arrest. Nor could the use of electronic surveillance without prior authorization be justified on grounds of 'hot pursuit.' And, of course, the very nature of electronic surveillance precludes its use pursuant to the suspect's consent.

"* * * And bypassing a neutral predetermination of the *scope* of a search leaves individuals secure from Fourth Amendment violations 'only in the discretion of the police.' * * *

"These considerations do not vanish when the search in question is transferred from the setting of a home, an office, or a hotel room to that of a telephone booth. Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures. The government agents here ignored 'the procedure of antecedent justification . . . that is central to the Fourth Amendment,' a procedure that we hold to be a constitutional precondition of the kind of electronic surveillance involved in this case. Because the surveillance here failed to meet that condition, and because it led to the petitioner's conviction, the judgment must be reversed."

This language, which is clear and convincing, is decisive here. In accordance with the ruling in *Katz,* we hold that the judgment from which this appeal was taken must be reversed.

2. In view of our disposition of this issue we find it unnecessary to consider other alleged trial errors cited by appellant.

Accordingly the judgment of the district court is reversed.

JUDGMENT REVERSED.

Nos. 16021 and 16022

CASTLE, *Circuit Judge,* dissenting. Unlike the situations presented in *Katz* v. *United States,* 389 U.S. 347, and *Berger* v. *New York,* 388 U.S. 41, there was no "eavesdropping" involved in the instant case. Here, one party to the conversations consented to their electronic recording and transmission. Although, like in *Hoffa* v. *United States,* 385 U.S. 293 and *Lewis* v. *United States,* 385 U.S. 206, such activity constituted a betrayal of the defendant's confidence, he did intend the informer to hear what he was told. And, that the informer breached the confidence the defendant reposed in him by recording and transmitting the conversations—or in permitting a government agent to overhear them—does not violate any constitutional right of the defendant.

In our recent decision in *United States* v. *Hagarty,* (No. 15881, Opinion filed January 11, 1968) cited by the majority this Court pointed out that, "[n]either Hagarty nor Nasser had consented to the eavesdropping".

A true Copy:
Teste:

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*Clerk of the United States Court of Appeals for the Seventh Circuit.*

## Appendix D.

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

September Term 1967

GEORGE HENRY DOTY,
Appellant,
vs
UNITED STATES OF AMERICA,
Appellee,
No. 9031

CLEO EPPS,
Appellant,
vs
UNITED STATES OF AMERICA,
Appellee,
No. 9032

RAYMOND O. JONES,
Appellant,
vs
UNITED STATES OF AMERICA,
Appellee
No. 9033

JERRY LEE HOLIDAY,
Appellant,
vs
UNITED STATES OF AMERICA,
Appellee
No. 9035

BILLY RAY ADAMS,
Appellant,
vs
UNITED STATES OF AMERICA,
Appellee,
No. 9036

HAROLD BEN MARLEY,
Appellant,
vs
UNITED STATES OF AMERICA,
Appellee,
No. 9037

ALBERT HILL, JR.,
Appellant,
vs
UNITED STATES OF AMERICA,
Appellee,
No. 9038

SAM GILBERT,
Appellant,
vs
UNITED STATES OF AMERICA,
Appellee.
No. 9034

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APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

Thomas A. Wallace (Everett S. Collins and Thomas A. Wallace on the briefs) for Appellants Doty (9031), Epps (9032), Jones (9033), and Gilbert (9034).
John A. Claro, for Appellants Holiday (9035), Adams (9036), Marley (9037), and Hill (9038).
James E. Ritchie, Assistant U. S. Attorney (Lawrence A. McSoud, United States Attorney; James E. Ritchie, Assistant U. S. Attorney; Robert P. Santee, Assistant U. S. Attorney, on the brief) for Appellee.

Before MURRAH, Chief Judge, JONES* and HILL, Circuit Judges.

JONES, Circuit Judge.

This is an illicit still and nontax-paid whiskey case on appeal from the United States District Court for the

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* of the Fifth Circuit, sitting by designation.

Northern District of Oklahoma. In that court the appellants George Doty, Cleo Epps, Raymond O. Jones, Jerry Lee Holiday, Billy Ray Adams, Harold Ben Marley, Albert Hill and Sam Gilbert, were tried together on an indictment containing fourteen substantive counts charging violations of 26 U.S.C.A. Secs. 5179(A), 5173(A), 5205(A)(2), 5601(A)(1), 5601(A)(2), 5601(A)(4), 5601(A)(7) and 5604(A)(1). A fifteenth count based on 18 U.S.C.A. Sec. 371 charged the defendants with conspiring among themselves and with other unnamed persons to violate the above and other sections of the Internal Revenue Code.[1]

With the exception of Sam Gilbert, who was charged only with conspiracy, verdicts of guilty were returned against each of the appellants on the several substantive charges against them. All of the defendants, except Albert Hill, were convicted of the conspiracy charge. Specifying numerous errors as a basis for reversal, the defendants have appealed from the judgments entered on the jury's verdicts. Because of our disposition of the case, however, several of the questions raised need not be discussed or decided.[2]

The principal and most persuasive of the appellants' arguments urges the impropriety of Government counsel's closing remarks to the jury. The record discloses that, of the eight defendants, only Cleo Epps and Sam Gilbert testified in their own behalf.[3]

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[1] 26 U.S.C.A. Secs. 5171(A), 5601(A)(8), and 5601(A)(12).

[2] Appellants Holiday and Adams assert that incriminating statements were elicited from them in violation of the Fifth Amendment; appellants Hill and Epps assert that a fatal variance exists between the indictment and the evidence adduced at the trial, and several of the appellants assert the lack of substantial evidence to show the existence of a conspiracy.

[3] Appellants Holiday and Marley also took the stand. But their testimony was elicited only in support of collateral motions.

The other defendants remained silent. Appellants contend here that the United States Attorney focused the jury's attention on this fact.

Government counsel's final argument was divided into two fifteen minute portions permitting time for the defense attorneys' closing remarks to intervene. At the beginning of Governmnet counsel's jury address, at a time when the jury is likely to be most attentive, the following observation was made:

> "I think the most important thing that has been demonstrated by the evidence in this case is that the evidence is uncontradicted as against every defendant except the defendant Epps and the defendant Gilbert. There is no evidence to deny George Doty, Raymond O. Jones, Thomas Graham. There has been no evidence to contradict that whatsoever. Upon your oaths as jurors, you have no other obligation except to come in with a verdict of guilty as to those defendants because that evidence goes to you now and is to be considered and it has not been contradicted by the defendants whatsoever. It is undisputed. There has been no explanation of it. It is uncontradicted evidence, therefore it stands for the truth."

And again in the second fifteen minute portion of his argument to the jury, the United States Attorney asserted:

> ". . . And as I warned you when I made my opening statement in this case, they are going to hit these minor things, but have they gotten up here and discussed the evidence in this case. They have not. Again, still even in the arguments, they have done nothing to show, to contradict the evidence against all of these defendants except two people. And who are these people? The

person who is running the operation and her brother who is the purchasing agent."

It is the general rule that Government counsel may direct the jury's attention to the fact that the evidence against the defendant is uncontradicted, especially when the facts in issue could be controverted by persons other than the defendant.[4] Ruiz v. United States, 10th Cir. 1966, 365 F. 2d 103. If this rule were controlling here, then the Government's contention that its attorney's remarks constitute fair comment might have some validity.[5] Because it is our view, however, that the attorney's remarks go beyond a permissive comment that the evidence is uncontradicted is shown by the more general rule as thus stated:

> "It is concededly improper and reversible error to comment on the failure of a defendant to testify in his own behalf, and the test is whether the language used was manifestly intended or was of such a character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." Knowles v. United States, 10th Cir. 1955, 224 F. 2d 168.

The prosecutor conceded that the Government's evidence was contradicted as to two defendants whom he named. These defendants had taken the stand. The prosecutor

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[4] The extent to which this rule conflicts, if at all, with Desmond v. United States, 1st Cir. 1965, 345 F. 2d 225, which held that a prosecutor could not properly say to the jury that the evidence was uncontradicted when only the defendant was able to controvert the damaging testimony, need not be discussed. We note only that this Circuit has not been confronted with a case where the fact of uncontradicted evidence has been pointed out to the jury when a defendant was the only person who could offer a contradiction.

[5] But see Desmond v. United States, *supra* note 4.

asserted and reasserted that the evidence was uncontradicted as to the others. The innuendo is plain. It is clear that the prosecutor intended that the jury should infer that the evidence was uncontradicted by those defendants who did not take the stand. When the prosecutor named the two who had testified and conceded that the evidence as to them was contradicted, can it be doubted that he commented upon the failure of the others to testify when he emphatically demanded the conviction of those who had not testified on the ground that: "The evidence is uncontradicted." The prosecutor's statement that the evidence "has not been contradicted by the defendants" was little, if any, different in meaning, in the context of his argument, from a statement that the defendants had not testified. We conclude that the prosecutor's comments were improper and prejudicial as to all of the appellants, except Gilbert and Epps, and that the convictions of these six appellants must be reversed on this ground.

The Government urges that, even if the prosecutor's comments were prejudicial, appellants have waived the error by failure to timely object. It is established that:

> "Counsel for the defense cannot as a rule remain silent, interpose no objections, and after a verdict has been returned seize for the first time on the point that the comments to the jury were improper and prejudicial." United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 238-239, 60 S.Ct. 811, 84 L.Ed. 1129.

In this connection, however, consideration must be given to Rule 52(b), Fed. R. Crim. Proc., 18 U.S.C.A., which provides:

> "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court."

We believe this rule to be controlling here.

It seems sufficient to say that the prosecutor's comments to the jury operated to diminish the scope of a clearly delineated constitutional guarantee.

> "For comment on the refusal to testify is a remnant of the 'inquisitorial system of criminal justice,' Murphy v. Waterfront Comm'n., 378 U.S. 52, 55, 84 S.Ct. 1594, 12 L.Ed.2d 678, which the Fifth Amendment outlaws. It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." Griffin v. California, 380 U.S. 609, 614, 85 S.Ct. 1229, 14 L.Ed. 2d 106, reh. den. 381 U.S. 957, 85 S.Ct. 1797, 14 L.Ed. 2d 730.

We would be remiss in holding, particularly where prejudice is so clearly apparent, that an error of constitutional dimensions does not affect substantial rights. See Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed. 2d 705; Kotteakos v. United States, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557. The error is plain; and, notwithstanding the failure to object, the comments cannot be condoned.[6]

Appellant Gilbert, who testified in his own behalf at the trial, challenges the sufficiency of the evidence to support the jury's verdict finding him guilty of conspiracy to violate several Internal Revenue laws of the United States. A conviction under 18 U.S.C.A. Sec. 371 requires "Proof of an agreement to commit an offense against the United

[6] Other cases finding a prosecutor's closing argument to constitute plain error are United States v. Graham, 6th Cir. 1963, 325 F.2d 922; Wagner v. United States, 5th Cir. 1959, 263 F.2d 877; Ginsberg v. United States, 5th Cir. 1958, 257 F.2d 950; Stewart v. United States, D.C. Cir. 1957, 247 F.2d 42; Read v. United States, 8th Cir. 1930, 42 F.2d 636.

States." Pereira v. United States, 347 U.S. 1, 12, 74 S.Ct. 358, 98 L.Ed. 435. In Jones v. United States, 10th Cir. 1958, 251 F. 2d 288, 290, it is stated by this Court:

> " 'In determining [the question of] the sufficiency of the evidence to support a verdict, the inferences to be drawn therefrom are viewed in the light most favorable to the prosecution.' " O'Neal v. United States (10th Cir. 1957, 240 F. 2d 700, 701); Seefeldt v. United States, 10th Cir., 183 F. 2d 713; Wilder v. United States, 10th Cir., 100 F. 2d 177. The agreement need not be in any particular form. By its nature it is seldom susceptible of direct proof. Ordinarily conspiracies can be established only by the acts and conduct of the conspirators and the inferences to be drawn therefrom. Butler v. United States, 10th Cir., 197 F. 2d 561. Generally convictions will be sustained if the circumstances, acts and conduct of the parties are of such character that the minds of reasonable men may conclude therefrom that an unlawful agreement exists."

Necessarily, knowledge of the conspiracy is "an essential ingredient of the proof" required to support a verdict. Ingram v. United States, 360 U.S. 672, 678, 79 S.Ct. 1314, 3 L.Ed. 2d 1503.

The evidence, as it relates to Sam Gilbert's involvement in a conspiracy, may be thus summarized. On March 30, 1965, Gilbert purchased 10,000 pounds of sugar from Gordon Hixson with funds obtained from his sister, appellant Epps. Hixson arranged the sale through a warehouse in Fort Smith, Arkansas. On April 8, 1965, an additional 12,000 pounds of sugar was purchased through the same grocer and warehouse, but Gilbert denies any involvement in this transaction. To prove Gilbert's involvement in the

second transaction, Alcohol and Tobacco Tax investigators testified that on April 8, 1965, they followed a red Ford truck travelling along Highway 64 away from Fort Smith, Arkansas, toward Warner, Oklahoma. Following two or three car-lengths behind the truck, the investigators, so they claimed, were able to ascertain that the truck contained many sacks of White Gold sugar. One of the investigators, Robert M. Finley, stated that, when the truck entered a weigh station near Warner, a 1964 maroon Chevrolet containing two occupants pulled off alongside the road just past the station. Finley testified that, after a few minutes, the maroon Chevrolet continued on into Warner, pulled into a drive-in parking area, remained there for a short while, proceeded back toward the weigh station, and then ten or fifteen minutes later returned to the drive-in parking area.

In addition to corroborating this account, John L. Day, the other investigator, testified that Sam Gilbert was the driver of the truck and identified Cleo Epps and Raymond O. Jones as the occupants of the maroon Chevrolet.

Our attention is directed to no other testimony showing appellant Gilbert's connection with or knowledge of the alleged conspiracy. Viewing the evidence in a light most favorable to the prosecution, it may be taken as established that Gilbert made large sugar purchases on March 30 and April 8, and that, on this latter occasion, he was convoyed into Oklahoma by his sister and Raymond O. Jones. The jury might conjecture that Gilbert was hauling sugar to a still but the fact that he was being followed for some undisclosed purpose by Epps and Jones does not trace the sugar to any still identified with any of the other alleged conspirators or into any illicit spirits which any of the other alleged conspirators may have made or sold. The most speculative conjecture could not place the sugar

hauled by Gilbert at the still of any of the other alleged conspirators at any pertinent time since the raid was a half year later. No testimony even intimates that Gilbert was personally involved in any of the whiskey sales. While Gilbert's sugar purchases and association with Epps and Jones may be sufficient to create a suspicion, we say here as this Court has said before:

> "Evidence which creates a mere suspicion of guilt is not enough. Guilt may not be inferred from mere association." Glover v. United States, 10th Cir. 1962, 306 F. 2d 594.

The evidence against Gilbert is not sufficient to support a conviction.

Appellant Cleo Epps, who also testified at the trial, was convicted on two counts of aiding and abetting others in the sale of untaxed spirits and of conspiracy to violate specified Internal Revenue laws relating to liquor. At trial the Government was permitted, over appellant's objection, to introduce into evidence several tape recordings of telephone conversations carried on between Epps and Charles Reese Walter, an undercover Alcohol and Tobacco Tax investigator. These recordings, which were made with the consent and under the direction of Agent Walter, constituted a substantial part of the Government's case against Epps. Epps contends here that the admission of these recordings into evidence invaded her rights under the Fourth Amendment.

Katz v. United States, 389 U.S. 347, 88 S.Ct. ——, 19 L.Ed. 2d 576, is the most recent of the Supreme Court decisions dealing with the admissibility of electronically obtained eavesdrop evidence. In that case, it was held that the use of an electronic listening and recording device attached to the outside of a public telephone booth to obtain

evidence against a suspect constituted a "search and seizure" within the meaning of the Fourth Amendment. Because the search was conducted without prior judicial sanction as required by the Fourth Amendment, Katz' conviction was reversed.

We think the principles of Katz are applicable here. There is, to be sure, a factual difference between this case and Katz. We are unable to see any distinguishing difference between the placing of the eavesdropping device at one rather than at the other end of the telephone line over which the recorded conversation was communicated. The fact that the appellant's recorded conversation was with an undercover agent of the Government does not render it admissible. United States v. White, 7th Cir. 1968, —— F. 2d ——, March 18, 1968, Nos. 16021, 16022. But see Dancy v. U.S. 5th Cir. 1968, —— F. 2d ——, Feb. 1, 1968, No. 24611. Because no prior approval by judge or magistrate was sought or obtained, the search was unreasonable, and appellant Epps is entitled to a new trial without this evidence being used against her.

It seems appropriate to observe that while the conviction of the appellant, Harold Ben Marley, is being reversed because of improper comment of the prosecuting attorney, a reversal would probably be required because of inadequate evidence to sustain a conviction. It is shown that Marley made several purchases of plastic jugs using the same alias as had been used by the appellant Jones in making similar purchases. More than four months after the last of his jug purchases, Marley was seen driving a pick-up truck along a country road about a mile distant from the location of the still which was involved in this cause and which was then under surveillance by the agents of the revenue. This evidence, like that against Gilbert, may create a strong suspicion that Marley was implicated

in a conspiracy with some or all of the other appellants, but it is not enough to make a case for the jury.

For the reasons herein set forth, the judgment of the district court as to all of the appellants is reversed and the cause remanded for such proceedings, not inconsistent with the opinion, as may be appropriate.

REVERSED AND REMANDED.

SUPREME COURT, U. S.
CORRECTED COPY
SEP 25 1968
JOHN F. DAVIS, CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 358

JACK DOUGLAS, ALEXANDER CELESTE, ARTHUR J. O'NEIL AND FRANK CELESTE,
*Petitioners,*
*v.*
COMMONWEALTH OF MASSACHUSETTS,
*Respondent.*

## BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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## TABLE OF CONTENTS


STATEMENT OF THE CASE ..... 1

SUMMARY OF ARGUMENT ..... 2

ARGUMENT

I. The petitioners' convictions are sustainable wholly apart from the single taped conversation admitted in evidence ..... 3

II. This case does not present an appropriate occasion to reconsider the case of *On Lee* v. *United States* ..... 6

III. It is manifestly clear that there is no violation of section 605 of the Federal Communications Act ..... 9

IV. Acceptance of petitioners' arguments would frustrate newly enacted state legislation designed to implement with care the guidelines for electronic surveillance previously set by this Court ..... 11

CONCLUSION ..... 13

APPENDIX

## Table of Authorities Cited

### Cases

*Berger* v. *New York*, 388 U.S. 41 ..... 11, 12, 13

*Commonwealth* v. *Douglas*, 1968 Mass. Adv. Sh. 641 ..... 3

*Commonwealth* v. *Maiani*, 1968 Mass. Adv. Sh. 837 ..... 8

*Goldman* v. *United States*, 316 U.S. 129 ..... 11

*Katz* v. *United States*, 389 U.S. 347 ..... 2, 7, 9, 13

*Lopez* v. *United States*, 373 U.S. 427 ..... 9, 11

*On Lee* v. *United States*, 343 U.S. 747 ..... 2, 6, 7, 13

*Osborn* v. *United States*, 385 U.S. 323 ..... 11

*Rathbun* v. *United States*, 355 U.S. 107 ..... 10

### Statutes, Etc.

Federal Communications Act, Sec. 605 ..... 3, 7, 9, 10n

31 Fed. Reg. 3400 § 15.11 ..... 10

Mass. G.L. c. 272 § 99 B. 4, as amended by Mass. St. 1968, c. 738 ..... 9n, 12, 13

Mass. G.L. c. 140§ 110 ..... 1

Omnibus Crime Control and Safe Streets Act of 1968, P.L. 90-351 ..... 8, 8n, 10, 12

1968 Regular New York Session Laws (McKinney's Session Laws News, July 10, 1968) Chapter 546 12

### Miscellaneous

American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Electronic Surveillance, (Tent. Draft, June, 1968) ..... 12

# In the Supreme Court of the United States.

OCTOBER TERM, 1968

No. 358

JACK DOUGLAS, ALEXANDER CELESTE, ARTHUR J. O'NEIL AND FRANK CELESTE,

*Petitioners,*

*v.*

THE COMMONWEALTH OF MASSACHUSETTS,

*Respondent.*

## BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

### STATEMENT OF THE CASE.

Petitioners Douglas, Frank Celeste, Alexander Celeste and Arthur J. O'Neil were convicted of various offenses in Suffolk Superior Court for the Commonwealth of Massachusetts. Douglas and O'Neil were convicted of threats to extort. Alexander Celeste was convicted of being an accessory before the fact to such threats. Frank Celeste and Alexander Celeste were convicted for violation of Massachusetts General Laws c. 140, §110, making it a crime for an unlicensed person to conduct a small loan business. Alexander Celeste, Douglas and Arthur O'Neil were convicted of conspiracy to extort. (1968 Mass. Adv. Sh. 641,

P. App. A 21)[1]. On appeal, the Massachusetts Supreme Judicial Court affirmed these convictions. The petition for writ of certiorari in this case seeks to review that decision. This brief is submitted by the Commonwealth of Massachusetts in opposition to the granting of that petition. Respondent does not accept the statement of facts as set forth in the petition. Those material facts which respondent disputes are hereinafter set forth in the reasons submitted for denying this petition.

## SUMMARY OF ARGUMENT.

The respondent will argue herein against the granting of certiorari on the grounds that:

(1) The petitioners' convictions may be sustained wholly apart from the single taped conversation admitted in evidence. That tape is largely corroborative of other evidence of the crimes charged. Thus this case is an unsuitable vehicle for deciding the broad constitutional and statutory questions presented in the petition (pp. 3 to 6 *infra*);

(2) This case is factually so different from *On Lee* v. *United States,* 343 U.S. 747, as to make reconsideration of *On Lee* inappropriate in this context, (pp. 6 to 7, *infra*). Not only is the informant here the victim, not the "associate" of the petitioners, but he also was available for cross-examination, unlike the situation presented by *On Lee.* Further, this case provides an inappropriate means for the reconsideration of *On Lee* because these petitioners have placed themselves beyond the scope of any reasonable expectation of privacy under *Katz* v. *United States,* 389 U.S. 347 (pp. 7 to 9, *infra*).

(3) This case raises no substantial issue whatsoever under Sec. 605 of the Federal Communications Act (pp. 9 to 11, *infra*); and

[1] P. App. A, refers to Appendix A of Petitioners' petition for writ of certiorari.

(4) Acceptance of petitioners' arguments would work considerable change in the effect of the Fourth Amendment on laws regulating the use of limited surveillance methods by law enforcement officials. In so doing acceptance would frustrate newly enacted state legislation designed to implement with care the guidelines for electronic surveillance previously set by this Court (pp. 11 to 13, *infra*).

## ARGUMENT.

### I. The Petitioners' Convictions Are Sustainable Wholly Apart From the Single Taped Conversation Admitted in Evidence.

The petitioners' claims presented to this Court are based wholly on the use and admissibility of a single taped conversation between Sacks and Douglas, recorded on or about October 17, 1966. (Mass. Adv. Sh. 646, P. App. A 26). This was the only taped conversation admitted in evidence, as petitioners concede (P. 2).[2] In this conversation, heard also by Mr. Jordan Ring, Sacks's attorney, and verified by him in court as accurate, Douglas "made demands for payment." So far as the record indicates, this was the sum and substance of the admitted conversation. (Mass. Adv. Sh. 646, P. App. A 26).

It is evident from an examination of the transcript of the trial and of the opinion of the Supreme Judicial Court, *Commonwealth* v. *Douglas*, 1968 Mass. Adv. Sh. 641, P. App A 21, that substantial and comprehensive evidence sufficient to sustain a conviction on each substantive offense had been presented by the District Attorney *before* the recording complained of by the petitioners was played for the jury. Melvin Sacks, the victim and principal state's witness, testified to receiving loans in September, 1963, and November, 1964, and to the process of payment (Mass. Adv. Sh.

[2] "P" refers to the petition for writ of certiorari.

642, P. App. A 22). Altogether, Sacks recalled and testified to eight conversations with Alexander Celeste, Douglas, and O'Neill where physical threats were directed against him and his family. (Mass. Adv. Sh. 643-645, P. App. A 23-25). The final conversation with Douglas prior to the recording occurred on October 15, 1966, and was also heard by Detective McLean who subsequently corroborated Sacks' testimony. (Mass. Adv. Sh. 645, P. App. A 25). The recording, in following the same tone and pattern of earlier conversations developed in Sacks's testimony, laid no new ground for the prosecution. At most it served to corroborate the testimony of Sacks or to enhance his credibility.

The recording in question was made on or about October 17, 1966. (Mass. Adv. Sh. 646, P. App. A 26). Admissible evidence presented relating to events prior to October 17 was more than sufficient to sustain all of the convictions. The Massachusetts Supreme Judicial Court, *inter alia,* recited the following evidence:

(1) Sacks testified that on August 24, 1966, Alexander Celeste struck Sacks in the face and kicked him in the stomach. Further, he told Sacks that "it was a cardinal sin to borrow money from another loan shark while owing one" and that if he "knew what was good for . . . [his] wife and kids," he had better not say anything to anyone from the district attorney's office, (Mass. Adv. Sh. 643, P. App. A 23).

(2) Earlier Alexander Celeste had shown Sacks two sticks of dynamite and said that he would not "think twice about blowing up" Sacks's house, (Mass. Adv. Sh. 643, P. App. A 23).

(3) On August 25 or 26, 1966, Sacks was told by Douglas that he "still owed some money" and that he would "have to make arrangements to pay it." He was subsequently informed by Douglas that "[y]ou better have it. . . . you

should pay it, if you don't want any trouble," (Mass. Adv. Sh. 644, P. App. A 24).

(4) On September 8, 1966, O'Neill told Sacks, "If you don't want to get hurt, you'd better get some money . . . real fast" and Douglas said, "[Y]ou are almost at the end of the road," (Mass. Adv. Sh. 644, P. App. A 24).

(5) On September 14, O'Neill told Sacks, "You'd better have some money or you could be put in the hospital for four or five weeks," (Mass. Adv. Sh. 644, P. App. A 24).

(6) On September 21, Douglas informed Sacks that "When you feel that cold barrel [of a gun] to your head, you'd be surprised how many ways you can think of of coming up with some money." Douglas added, "[Y]our kid must have a long walk . . . from school, and you wouldn't want anything to happen to her knee caps on the way home, would you?" (Mass. Adv. Sh. 644, P. App. A 24).

(7) On October 11 or 12, 1966, Douglas said to Sacks, "I should bust you right in the face right now, but I am not going to. I am going to see what I can do for you, but you'd better have some money in the next day or so." (Mass. Adv. Sh. 645, P. App. A 25).

(8) On October 15, Sacks was again advised by Douglas that he had "better come up with the money." Douglas also stated to Sacks, that "I should have busted you this morning." (Mass. Adv. Sh. 645, P. App. A 25).

Considering the limited significance of the recording in the total context of the record and the weight of all the evidence of the prosecution which preceeded it, petitioners' opening statement that the recording "beyond dispute . . . constituted an important part of the Commonwealth's case and that, if it was improperly admitted, petitioners' convictions cannot stand" (P. 2-3) must be rejected. Thus the questions sought to be raised by the petitioners were

not central to their convictions and therefore do not present an appropriate occasion for this Court's consideration of them.

## II. This Case Does Not Present An Appropriate Occasion To Reconsider The Case Of On Lee vs. United States.

The first question presented by the petition for a writ of certiorari is

> "[D]o the Fourth and Fourteenth Amendments to the United States Constitution require prior judicial approval before the police may lawfully record and introduce into evidence the contents of the telephone conversation between the criminal defendant who was unaware that the conversation was being monitored and the person who consented to the installation of the recording device on his telephone?" (P. 5).

Petitioners argue that this case will provide an opportunity for the Court to reconsider its decision in the case of *On Lee* vs. *United States,* 343 U.S. 747 (P. 6).

### *A. The Facts of This Case Do Not Present an On Lee Situation.*

First, it is important to note that neither the petitioners nor the Commonwealth referred to *On Lee* in their briefs before the Supreme Judicial Court, and that the opinion of that Court does not cite, let alone rely upon, the decision of *On Lee.* Thus the *On Lee* claim is being pressed in this Court for the first time.

In *On Lee,* petitioner was convicted of federal narcotics violations. While on bail, pending trial, an old acquaintance and former employee of petitioner entered onto petitioner's business premises and engaged petitioner in conversation. In the course of the conversation petitioner made incriminating statements. Petitioner did not know

that his former employee was an undercover agent and that he was wired for sound. An agent of the Bureau of Narcotics with a receiving set which allowed him to hear the incriminating statements was positioned outside of the premises. A few days later another conversation took place under similar circumstances. At the trial the agent was allowed to testify as to the conversations he heard with aid of his receiving set. This court affirmed, finding no 4th Amendment violation or violation of section 605 of the Federal Communications Act.

Petitioners ingenuously characterize Sacks as a "long time associate and co-worker" of the petitioners here, as analogous to the "associate" situation in *On Lee* (P. 6, 8). From this premise, petitioners state that if certiorari is granted they will ask this Court to apply the rule ennunciated in *Katz* vs. *United States,* 389 U.S. 347 to the effect that petitioner Douglas was "justified" in expecting that his conversation would not be "broadcast to the world" (P. 8-11). Petitioners, however, overlook that Sacks was hardly the "associate" that was present in *On Lee.* Sacks was the victim of threats of extortion, and not the old friend that was engaging in a social conversation as in *On Lee.* Furthermore, Sacks testified in this case and was available for cross examination while the associate in *On Lee* did not testify and was not available for cross examination[3]. Thus the facts of this case are sufficiently different from those of *On Lee* that it is not an appropriate occasion for this Court to consider overruling that decision.

*B. The Use of the Taped Conversation is Entirely Consistent with and Supported by Katz* v. *United States.*

Petitioners further argue that obviously Douglas expected his conversation be private. Thus they argue that the subjective test of *Katz* is met where the person exhibits

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[3] Petitioners recognize this important difference (P. 8, n. 4).

an expectation of privacy (P. 10 n. 7)[4]. Petitioners will therefore argue, if permitted, whether the second of the two fold test of *Katz* is met, to wit, that the expectation be one that society is reasonably prepared to meet. It is manifestly clear that society is not prepared to recognize the expectation of the underworld that their threats of extortion and intimidation go unheard.[5] Indeed, even the subjective expectation of Douglas that his words would go undivulged was based on petitioners totally inculcating their victim with fear for his own life and that of his family. It hardly seems important to grant the petitioners an opportunity to argue the issue whether or not society is prepared to recognize their expectation as reasonable when the answer is obvious. Of crucial signifiance is the fact that the very action complained of by the petitioners has been authorized by the recently enacted Omnibus Crime Control and Safe Streets Act of 1968, P.L. 90-351. Section 2511(2)(c) of this Act provides that "[i]t shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communciation, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception." Certainly this recently enacted legislation is indicative that society is not prepared to recognize the expectation of petitioners.[6]

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[4] In so doing, petitioners assert that Douglas knew that Sacks did not have an extension line on his home telephone (P. 7), without citing any supporting evidence to that effect.

[5] The petitioners misuse the fact that the recorded conversation constituted in itself a crime. (P. 11, n.8). The Supreme Judicial Court did not hold that such conversations were not entitled to 4th Amendment protection, as such. Rather the criminal nature of the words goes to the reasonableness of an expectation of privacy. See *Commonwealth* v. *Maiani*, 1968 Mass. Adv. Sh. 837 n.5, P. App. B 40 n.5.

[6] Passing on the question posed by the petition would obviously indirectly pass on the constitutionality of the cited provision of the Omnibus Crime Control and Safe Streets Act. While petitioners

This case is more similar to *Lopez* vs. *United States,* 373 U.S. 427, than *On Lee.* In *Lopez,* petitioner was convicted in a Federal District Court of attempting to bribe an internal revenue agent. During the course of a pre-arranged appointment the agent recorded his conversation with petitioner on a pocket wire recorder. At the trial, the agent testified concerning his conversations with petitioner and his testimony was corroborated by admission in evidence of the recording. Petitioner did know that the person he spoke to was an agent. The bribe was made in an attempt to have the agent not report an alleged violation of the internal revenue laws. This court said "[W]e think the *risk* that petitioner took in offering the bribe to Davis fairly included the risk that the offer would be accurately reproduced in court, *whether by faultless memory or mechanical recording*" 373 U.S. 439 (emphasis added.) Likewise persons who use threats to extort run the risk that their victims will enable law enforcement officials reasonable means to overhear those conversations.

Thus, petitioners have placed themselves beyond the scope of any reasonable expectation of privacy under *Katz* v. *United States,* 389 U.S. 347, making a reconsideration of *On Lee,* in the light of *Katz,* wholly unncessary in the context of this case.

## III. It Is Manifestly Clear That There Is No Violation of Section 605 Of The Federal Communications Act.

The second question petitioners seek to present is:

"Do section 605 of the Federal Communications Act and the regulations promulgated thereunder require prior

point to some conflict in present decisions, the effect of that conflict and importance to law enforcement in the states is unclear. On the other hand, since the Omnibus Crime Control and Safe Streets Act is of such nation-wide federal importance it would seem far better to review the question directly in a federal context. Recently enacted Massachusetts legislation similarly allows the acts complained of by petitioners without prior judicial authority. Mass. G.L. c. 272, §99 B. 4., inserted by Mass. St. 1968, c. 738, reproduced in Appendix.

judicial approval before the police may lawfully record and introduce into evidence the contents of a telephone conversation between a criminal defendant who was unaware that the conversation was being monitored and a person who consented to the installation of the recording device on his telephone? (P. 5)." In connection with this question they note that this Court's decision in *Rathbun vs. United States,* 355 U.S. 107 has been modified by a regulation which now bars the use of eavesdropping or recording devices without the authorization of all parties engaging in the conversation except operations of any law enforcement office, conducted "under lawful authority" (31 Fed. Reg. 3400, § 15.11). From this they sound the alarm that the Court's guidance is needed as to the meaning of "lawful authority" (P. 17). They argue that the term requires prior judicial approval. However, such an interpretation is unwarranted and not one on which the courts have disagreed.[7] It is manifestly clear that "lawful authority" is used in the context of a law enforcement official discharging his official duties. A phrase similar to "under lawful authority" is used in the recently enacted Omnibus Crime Control and Safe Streets Act of 1968, P.L. 90-351. This phrase, quoted *supra* at p. 8, provides that it shall not be unlawful for a person acting under *color of law* to intercept a communication with the consent of one of the parties thereto. (Sec. 2511 (2) (c). Congress obviously had no intention of authorizing a law enforcement official to act without judicial approval under the Crime Control Act while creating a violation for the same conduct under the Federal Communications Act.

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[7] To the extent there is a conflict in the circuits on the precise issue of allowing the introduction of the contents of a recorded telephone conversation without prior judicial approval where one person consents to the installation of the recording device on his telephone, the conflict does not center on the interpretation of Sec. 605 of the Federal Communications Act.

Therefore, whether or not there is a violation of Sec. 605 in this context does not present a substantial and important question for the Court's consideration.

## IV. Acceptance Of Petitioners' Arguments Would Frustrate Newly Enacted State Legislation Designed To Implement With Care The Guidelines For Electronic Surveillance Previously Set By This Court.

Petitioners' analysis of the events of this case would suggest that they have uncovered an old and nefarious practice which time and the decisions of this Court have rendered unlawful. This analysis, which appears to generate so much momentum for petitioners' arguments, is notably inaccurate. The process of which petitioners complain can be viewed in the light of the most current and responsive legislative enactments.

Unquestionably, this court in the landmark case, *Berger* v. *New York*, 388 U.S. 41, invited state legislation to prohibit and, consistant with the opinion, to allow controlled use of electronic surveillance techniques. At 388 U.S. 63, this Court stated that:

> . . . this Court has in the past, under specific conditions and circumstances, sustained the use of eavesdropping devices. See *Goldman* v. *United States*, 316 U.S. 129; *On Lee* v. *United States*, 343 U.S. 747; *Lopez* v. *United States, supra;* and *Osborn* v. *United States, supra.* In the latter case the eavesdropping device was permitted where the "commission of a specific offense" was charged, its use was "under the most precise and discriminate circumstances" and the effective administration of justice in a federal court was at stake. The States are under no greater restrictions. . . .

In response, the General Court of the Commonwealth of Massachusetts wrote into law a comprehensive bill (see Mass. St. 1968, c. 738, reproduced in the Appendix hereto) which, in covering each point of the decision and beyond, evidenced a cooperation with the spirit as well as the letter of the *Berger* opinion. In good faith and in reliance upon *Berger* and other electronic surveillance cases of this Court cited previously in this brief, the Massachusetts legislature enacted as part of the new law the following provision (c. 272, §99B.4.):

> 4. The term "interception" [made unlawful by the act] means to secretly hear, secretly record, or aid another to secretly hear or secretly record the contents of any wire or oral communication through the use of any intercepting device by any person other than a person given prior authority by all parties to such communication; *provided that it shall not constitute an interception for an investigative or law enforcement officer . . . to record or transmit a wire or oral communication if the officer is a party to such communication or has been given prior authorization to record or transmit the communication by such a party* and if recorded or transmitted in the course of an investigation of a designated offense as defined herein. (emphasis supplied)

Other states appear to have responded to *Berger* as well. See, e.g., Chapter 546 of the 1968 Regular New York Session Laws (McKinney's Session Laws News, July 10, 1968) and American Bar Association Project on Minimum Standards for Criminal Justice, *Standards Relating to Electronic Surveillance* (Tent. Draft, June, 1968) page 20 n.39. As noted at two earlier points in this brief (p. 8n.6 and p. 10), the federal response to *Berger,* contained in the Omnibus Crime Control and Safe Streets Act of 1968, P.L. 90-351, is similarly indirectly in issue in this case.

Petitioners have no present relief available on the strength of current Supreme Court opinions. This emerges as the clear conclusion to be drawn from the authority cited by both respondent and petitioners. Petitioners conceed as much by implication throughout their brief. Thus they argue for overruling *On Lee* v. *United States, supra,* and ask for the extension of *Katz* v. *United States, supra* into an uncharted area. They further base their hopes on the unexpressed views of two Supreme Court Justices (P. 9).

It would be unfortunate indeed for the enlightened and responsive statutory plan which has currently been initiated in Massachusetts to be frustrated by the invocation of the constitutional doctrine espoused by petitioners. The states must be permitted some leeway in their legislative responses to recent constitutional doctrine. *Berger's* invitation in June, 1967, has been accepted by Massachusetts in what we believe is a creative fashion. The occasion for an adjudication by this Court on the merits of claims such as those presented by petitioners should await, we submit, a time at which the operative effects of Mass. St. 1968, c. 738 may be fairly assessed.

## CONCLUSION.

For the foregoing reasons it is respectfully urged that the petition for writ of certiorari be denied.

RESPECTFULLY SUBMITTED
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# CRIMES AND PUNISHMENTS—WIRETAPPING AND EAVESDROPPING

## CHAPTER 738.

**An Act further regulating wiretapping and eavesdropping.**

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

Section 1. **Chapter 272** of the General Laws is hereby amended by striking out **section 99,** as amended by chapter 449 of the acts of 1959, and inserting in place thereof the following section:

**Section 99.**

Interception of wire and oral communications.—

A. Preamble.

The general court finds that organized crime exists within the commonwealth and that the increasing activities of organized crime constitute a grave danger to the public welfare and safety. Organized crime, as it exists in the commonwealth today, consists of a continuing conspiracy among highly organized and disciplined groups to engage in supplying illegal goods and services. In supplying these goods and services organized crime commits unlawful acts and employs brutal and violent tactics. Organized crime is infiltrating legitimate business activities and depriving honest businessmen of the right to make a living.

The general court further finds that because organized crime carries on its activities through layers of insulation and behind a wall of secrecy, government has been unsuccessful in curtailing and eliminating it. Normal investigative procedures are not effective in the investigation of illegal acts committed by organized crime. Therefore, law enforcement officials must be permitted to use modern methods of electronic surveillance, under strict judicial supervision, when investigating these organized criminal activities.

The general court further finds that the uncontrolled development and unrestricted use of modern electronic surveillance devices pose grave dangers to the privacy of all citizens of the commonwealth. Therefore, the secret use of such devices by private individuals must be prohibited. The use of such devices by law enforcement officials must be conducted under strict judicial supervision and should be limited to the investigation of organized crime.

B. Definitions. As used in this section—

1. The term "wire communication" means any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception.

2. The term "oral communication," means speech, except such speech as is transmitted over the public air waves by radio or other similar device.

3. The term "intercepting device" means any device or apparatus which is capable of transmitting, receiving, amplifying, or recording a wire or oral communication other than a hearing aid or similar device which is being used to correct subnormal hearing to normal and other than any telephone or telegraph instrument, equipment, facility, or a component thereof, (*a*) furnished to a subscriber or user by a communications common carrier in the ordinary course of its business under its tariff and being used by the subscriber or user in the ordinary course of its business; or (*b*) being used by a communications common carrier in the ordinary course of its business.

4. The term "interception" means to secretly hear, secretly record, or aid another to secretly hear or secretly record the contents of any wire or oral communication through the use of any intercepting device by any person other than a person given prior authority by all parties to such communication; provided that it shall not constitute an interception for an investigative or law enforcement offi-

cer, as defined in this section, to record or transmit a wire or oral communication if the officer is a party to such communication or has been given prior authorization to record or transmit the communication by such a party and if recorded or transmitted in the course of an investigation of a designated offense as defined herein.

5. The term "contents", when used with respect to any wire or oral communication, means any information concerning the identity of the parties to such communication or the existence, contents, substance, purport, or meaning of that communication.

6. The term "aggrieved person" means any individual who was a party to an intercepted wire or oral communication or who was named in the warrant authorizing the interception, or who would otherwise have standing to complain that his personal or property interest or privacy was invaded in the course of an interception.

7. The term "designated offense" shall include the following offenses in connection with organized crime as defined in the preamble: arson, assault and battery with a dangerous weapon, extortion, bribery, burglary, embezzlement, forgery, gaming in violation of section seventeen of chapter two hundred and seventy-one of the general laws, intimidation of a witness or juror, kidnapping, larceny, lending of money or things of value in violation of the general laws, mayhem, murder, any offense involving the possession or sale of a narcotic or harmful drug, perjury, prostitution, robbery, subornation of perjury, any violation of this section, being an accessory to any of the foregoing offenses and conspiracy or attempt or solicitation to commit any of the foregoing offenses.

8. The term "investigative or law enforcement officer" means any officer of the United States, a state or a political subdivision of a state, who is empowered by law to conduct investigations of, or to make arrests for, the designated offenses, and any attorney authorized by law to participate in the prosecution of such offenses.

9. The term "judge of competent jurisdiction" means any justice of the superior court of the commonwealth.

10. The term "chief justice" means the chief justice of the superior court of the commonwealth.

11. The term "issuing judge" means any justice of the superior court who shall issue a warrant as provided herein or in the event of his disability or unavailability any other judge of competent jurisdiction designated by the chief justice.

12. The term "communication common carrier" means any person engaged as a common carrier in providing or operating wire communication facilities.

13. The term "person" means any individual, partnership, association, joint stock company, trust, or corporation, whether or not any of the foregoing is an officer, agent or employee of the United States, a state, or a political subdivision of a state.

14. The terms "sworn" or "under oath" as they appear in this section shall mean an oath or affirmation or a statement subscribed to under the pains and penalties of perjury.

15. The terms "applicant attorney general" or "applicant district attorney" shall mean the attorney general of the commonwealth or a district attorney of the commonwealth who has made application for a warrant pursuant to this section.

16. The term "exigent circumstances" shall mean the showing of special facts to the issuing judge as to the nature of the investigation for which a warrant is sought pursuant to this section which require secrecy in order to obtain the information desired from the interception sought to be authorized.

C. Offenses.

1. Interception, oral communications prohibited.

Except as otherwise specifically provided in this section any person who—

willfully commits an interception, attempts to commit an interception, or procures any other person to commit an interception or to attempt to commit an interception of any wire or oral communication shall be fined not more than ten thousand dollars, or imprisoned in the state prison for not more than five years, or imprisoned in a jail or house of correction for not more than two and one half years, or both so fined and given one such imprisonment.

Proof of the installation of any intercepting device by any person under circumstances evincing an intent to commit an interception, which is not authorized or permitted by this section, shall be prima facie evidence of a violation of this subparagraph.

2. Editing of tape recordings in judicial proceeding prohibited.

Except as otherwise specifically provided in this section any person who—

willfully edits, alters or tampers with any tape, transcription or recording of oral or wire communications by any means, or attempts to edit, alter or tamper with any tape, transcription or recording of oral or wire communications by any means with the intent to present in any judicial proceeding or proceeding under oath, or who presents such recording or permits such recording to be presented in any judicial proceeding or proceeding under oath, without fully indicating the nature of the changes made in the original state of the recording, shall be fined not more than ten thousand dollars ($10,000.00) or imprisoned in the state prison for not more than five years or imprisoned in a jail or house of correction for not more than two years or both so fined and given one such imprisonment.

3. Disclosure or use of wire or oral communications prohibited.

Except as otherwise specifically provided in this section any person who—

a. willfully discloses or attempts to disclose to any person the contents of any wire or oral communication, knowing that the information was obtained through interception; or

b. willfully uses or attempts to use the contents of any wire or oral communication, knowing that the information was obtained through interception, shall be guilty of a misdemeanor punishable by imprisonment in a jail or a house of correction for not more than two years or by a fine of not more than five thousand dollars or both.

4. Disclosure of contents of applications, warrants, renewals, and returns prohibited.

Except as otherwise specifically provided in this section any person who—

willfully discloses to any person, any information concerning or contained in, the application for, the granting or denial of orders for interception, renewals, notice or return on an ex parte order granted pursuant to this section, or the contents of any document, tape, or recording kept in accordance with paragraph N, shall be guilty of a misdemeanor punishable by imprisonment in a jail or a house of correction for not more than two years or by a fine of not more than five thousand dollars or both.

5. Possession of interception devices prohibited.

A person who possesses any intercepting device under circumstances evincing an intent to commit an interception not permitted or authorized by this section, or a person who permits an intercepting device to be used or employed for an interception not permitted or authorized by this section, or a person who possesses an intercepting device knowing that the same is intended to be used to commit an interception not permitted or authorized by this section, shall be guilty of a misdemeanor punishable by imprisonment in a jail or house of correction for not more than two years or by a fine of not more than five thousand dollars or both.

The installation of any such intercepting device by such person or with his permission or at his direction shall be prima facie evidence of possession as required by this subparagraph.

6. Any person who permits or on behalf of any other person commits or attempts to commit, or any person who participates in a conspiracy to commit or to attempt to commit, or any accessory to a person who commits a violation of subparagraphs 1 through 5 of paragraph C of this section shall be punished in the same manner as is provided for the respective offenses as described in subparagraphs 1 through 5 of paragraph C.

D. Exemptions.

1. Permitted interception of wire or oral communications.

It shall not be a violation of this section—

a. for an operator of a switchboard, or an officer, employee, or agent of any communication common carrier, whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal

course of his employment while engaged in any activity which is a necessary incident to the rendition of service or to the protection of the rights or property of the carrier of such communication, or which is necessary to prevent the use of such facilities in violation of section fourteen A of chapter two hundred and sixty-nine of the general laws; provided, that said communication common carriers shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

*b.* for persons to possess an office intercommunication system which is used in the ordinary course of their business or to use such office intercommunication system in the ordinary course of their business.

*c.* for investigative and law enforcement officers of the United States of America to violate the provisions of this section if acting pursuant to authority of the laws of the United States and within the scope of their authority.

*d.* for any person duly authorized to make specified interceptions by a warrant issued pursuant to this section.

2. Permitted disclosure and use of intercepted wire or oral communications.

*a.* Any investigative or law enforcement officer, who, by any means authorized by this section, has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose such contents or evidence in the proper performance of his official duties.

*b.* Any investigative or law enforcement officer, who, by any means authorized by this section has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may use such contents or evidence in the proper performance of his official duties.

*c.* Any person who has obtained, by any means authorized by this section, knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose such contents while giving testimony under oath or affirmation in any criminal proceeding in any court of the United States or of any state or in any federal or state grand jury proceeding.

*d.* The contents of any wire or oral communication intercepted pursuant to a warrant in accordance with the provisions of this section, or evidence derived therefrom, may otherwise be disclosed only upon a showing of good cause before a judge of competent jurisdiction.

*e.* No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, the provisions of this section shall lose its privileged character.

E. Warrants: when issuable:

A warrant may issue only:

1. Upon a sworn application in conformity with this section; and

2. Upon a showing by the applicant that there is probable cause to believe that a designated offense has been, is being, or is about to be committed and that evidence of the commission of such an offense may thus be obtained or that information which will aid in the apprehension of a person who the applicant has probable cause to believe has committed, is committing, or is about to commit a designated offense may thus be obtained; and

3. Upon a showing by the applicant that normal investigative procedures have been tried and have failed or reasonably appear unlikely to succeed if tried.

F. Warrants: application.

1. Application. The attorney general, any assistant attorney general specially designated by the attorney general, any district attorney, or any assistant district attorney specially designated by the district attorney may apply ex parte to a judge of competent jurisdiction for a warrant to intercept wire or oral communications. Each application ex parte for a warrant must be in writing, subscribed and sworn to by the applicant authorized by this subparagraph.

2. The application must contain the following:

*a.* A statement of facts establishing probable cause to believe that a particularly described designated offense has been, is being, or is about to be committed; and

*b.* A statement of facts establishing probable cause to believe that oral or wire communications of a particularly described person will constitute evidence of such designated offense or will aid in the apprehension of a person who the applicant

has probable cause to believe has committed, is committing, or is about to commit a designated offense; and

*c.* That the oral or wire communications of the particularly described person or persons will occur in a particularly described place and premises or over particularly described telephone or telegraph lines; and

*d.* A particular description of the nature of the oral or wire communications sought to be overheard; and

*e.* A statement that the oral or wire communications sought are material to a particularly described investigation or prosecution and that such conversations are not legally privileged; and

*f.* A statement of the period of time for which the interception is required to be maintained. If practicable, the application should designate hours of the day or night during which the oral or wire communications may be reasonably expected to occur. If the nature of the investigation is such that the authorization for the interception should not automatically terminate when the described oral or wire communications have been first obtained, the application must specifically state facts establishing probable cause to believe that additional oral or wire communications of the same nature will occur thereafter; and

*g.* If it is reasonably necessary to make a secret entry upon a private place and premises in order to install an intercepting device to effectuate the interception, a statement to such effect; and

*h.* If a prior application has been submitted or a warrant previously obtained for interception of oral or wire communications, a statement fully disclosing the date, court, applicant, execution, results, and present status thereof; and

*i.* If there is good cause for requiring the postponement of service pursuant to paragraph L, subparagraph 2, a description of such circumstances, including reasons for the applicant's belief that secrecy is essential to obtaining the evidence or information sought.

3. Allegations of fact in the application may be based either upon the personal knowledge of the applicant or upon information and belief. If the applicant personally knows the facts alleged, it must be so stated. If the facts establishing such probable cause are derived in whole or part from the statements of persons other than the applicant, the sources of such information and belief must be either disclosed or described; and the application must contain facts establishing the existence and reliability of any informant and the reliability of the information supplied by him. The application must also state, so far as possible, the basis of the informant's knowledge or belief. If the applicant's information and belief is derived from tangible evidence or recorded oral evidence, a copy or detailed description thereof should be annexed to or included in the application. Affidavits of persons other than the applicant may be submitted in conjunction with the application if they tend to support any fact or conclusion alleged therein. Such accompanying affidavits may be based either on personal knowledge of the affiant or information and belief, with the source thereof, and reason therefor, specified.

G. Warrants: application to whom made.

Application for a warrant authorized by this section must be made to a judge of competent jurisdiction in the county where the interception is to occur, or the county where the office of the applicant is located, or in the event that there is no judge of competent jurisdiction sitting in said county at such time, to a judge of competent jurisdiction sitting in Suffolk County; except that for these purposes, the office of the attorney general shall be deemed to be located in Suffolk County.

H. Warrants: application how determined.

1. If the application conforms to paragraph F, the issuing judge may examine under oath any person for the purpose of determining whether probable cause exists for the issuance of the warrant pursuant to paragraph E. A verbatim transcript of every such interrogation or examination must be taken, and a transcription of the same, sworn to by the stenographer, shall be attached to the application and be deemed a part thereof.

2. If satisfied that probable cause exists for the issuance of a warrant the judge may grant the application and issue a warrant in accordance with paragraph I. The application and an attested copy of the warrant shall be retained by the

issuing judge and transported to the chief justice of the superior court in accordance with the provisions of paragraph N of this section.

3. If the application does not conform to paragraph F, or if the judge is not satisfied that probable cause has been shown sufficient for the issuance of a warrant, the application must be denied.

I. Warrants: form and content.

A warrant must contain the following:

1. The subscription and title of the issuing judge; and

2. The date of issuance, the date of effect, and termination date which in no event shall exceed thirty days from the date of effect. The warrant shall permit interception of oral or wire communications for a period not to exceed fifteen days. If physical installation of a device is necessary, the thirty-day period shall begin upon the date of installation. If the effective period of the warrant is to terminate upon the acquisition of particular evidence or information or oral or wire communication, the warrant shall so provide; and

3. A particular description of the person and the place, premises or telephone or telegraph line upon which the interception may be conducted; and

4. A particular description of the nature of the oral or wire communications to be obtained by the interception including a statement of the designated offense to which they relate; and

5. An express authorization to make secret entry upon a private place or premises to install a specified intercepting device, if such entry is necessary to execute the warrant; and

6. A statement providing for service of the warrant pursuant to paragraph L except that if there has been a finding of good cause shown requiring the postponement of such service, a statement of such finding together with the basis therefor must be included and an alternative direction for deferred service pursuant to paragraph L, subparagraph 2.

J. Warrants: renewals.

1. Any time prior to the expiration of a warrant or a renewal thereof, the applicant may apply to the issuing judge for a renewal thereof with respect to the same person, place, premises or telephone or telegraph line. An application for renewal must incorporate the warrant sought to be renewed together with the application therefor and any accompanying papers upon which it was issued. The application for renewal must set forth the results of the interceptions thus far conducted. In addition, it must set forth present grounds for extension in conformity with paragraph F, and the judge may interrogate under oath and in such an event a transcript must be provided and attached to the renewal application in the same manner as is set forth in subparagraph 1 of paragraph H.

2. Upon such application, the judge may issue an order renewing the warrant and extending the authorization for a period not exceeding fifteen (15) days from the entry thereof. Such an order shall specify the grounds for the issuance thereof. The application and an attested copy of the order shall be retained by the issuing judge to be transported to the chief justice in accordance with the provisions of subparagraph N of this section. In no event shall a renewal be granted which shall terminate later than two years following the effective date of the warrant.

K. Warrants: manner and time of execution.

1. A warrant may be executed pursuant to its terms anywhere in the commonwealth.

2. Such warrant may be executed by the authorized applicant personally or by any investigative or law enforcement officer of the commonwealth designated by him for the purpose.

3. The warrant may be executed according to its terms during the hours specified therein, and for the period therein authorized, or a part thereof. The authorization shall terminate upon the acquisition of the oral or wire communications, evidence or information described in the warrant. Upon termination of the authorization in the warrant and any renewals thereof, the interception must cease at once, and any device installed for the purpose of the interception must be removed as soon thereafter as practicable. Entry upon private premises for the removal of such device is deemed to be authorized by the warrant.

L. Warrants: service thereof.

1. Prior to the execution of a warrant authorized by this section or any renewal thereof, an attested copy of the warrant or the renewal must, except as otherwise provided in subparagraph 2 of this paragraph, be served upon a person whose oral or wire communications are to be obtained, and if an intercepting device is to be installed, upon the owner, lessee, or occupant of the place or premises, or upon the subscriber to the telephone or owner or lessee of the telegraph line described in the warrant.

2. If the application specially alleges exigent circumstances requiring the postponement of service and the issuing judge finds that such circumstances exist, the warrant may provide that an attested copy thereof may be served within thirty days after the expiration of the warrant or, in case of any renewals thereof, within thirty days after the expiration of the last renewal; except that upon a showing of important special facts which set forth the need for continued secrecy to the satisfaction of the issuing judge, said judge may direct that the attested copy of the warrant be served on such parties as are required by this section at such time as may be appropriate in the circumstances but in no event may he order it to be served later than three (3) years from the time of expiration of the warrant or the last renewal thereof. In the event that the service required herein is postponed in accordance with this paragraph, in addition to the requirements of any other paragraph of this section, service of an attested copy of the warrant shall be made upon any aggrieved person who should reasonably be known to the person who executed or obtained the warrant as a result of the information obtained from the interception authorized thereby.

3. The attested copy of the warrant shall be served on persons required by this section by an investigative or law enforcement officer of the commowealth by leaving the same at his usual place of abode, or in hand, or if this is not possible by mailing the same by certified or registered mail to his last known place of abode. A return of service shall be made to the issuing judge, except, that if such service is postponed as provided in subparagraph 2 of paragraph L, it shall be made to the chief justice. The return of service shall be deemed a part of the return of the warrant and attached thereto.

M. Warrant: return.

Within seven days after termination of the warrant or the last renewal thereof, a return must be made thereon to the judge issuing the warrant by the applicant therefor, containing the following:

*a.* a statement of the nature and location of the communications facilities, if any, and premises or places where the interceptions were made; and

*b.* the periods of time during which such interceptions were made; and

*c.* the names of the parties to the communications intercepted if known; and

*d.* the original recording of the oral or wire communications intercepted, if any; and

*e.* a statement attested under the pains and penalties of perjury by each person who heard oral or wire communications as a result of the interception authorized by the warrant, which were not recorded, stating everything that was overheard to the best of his recollection at the time of the execution of the statement.

N. Custody and secrecy of papers and recordings made pursuant to a warrant.

1. The contents of any wire or oral communication intercepted pursuant to a warrant issued pursuant to this section shall, if possible, be recorded on tape or wire or other similar device. Duplicate recordings may be made for use pursuant to subparagraphs 2(*a*) and (*b*) of paragraph D for investigations. Upon examination of the return and a determination that it complies with this section, the issuing judge shall forthwith order that the application, all renewal applications, warrant, all renewal orders and the return thereto be transmitted to the chief justice by such persons as he shall designate. Their contents shall not be disclosed except as provided in this section. The application, renewal applications, warrant, the renewal order and the return or any one of them or any part of them may be transferred to any trial court, grand jury proceeding of any jurisdiction by any law enforcement or investigative officer or court officer designated by the chief jus-

tice and a trial justice may allow them to be disclosed in accordance with paragraph D, subparagraph 2, or paragraph O or any other applicable provision of this section.

The application, all renewal applications, warrant, all renewal orders and the return shall be stored in a secure place which shall be designated by the chief justice, to which access shall be denied to all persons except the chief justice or such court officers or administrative personnel of the court as he shall designate.

2. Any violation of the terms and conditions of any order of the chief justice, pursuant to the authority granted in this paragraph, shall be punished as a criminal contempt of court in addition to any other punishment authorized by law.

3. The application, warrant, renewal and return shall be kept for a period of five (5) years from the date of the issuance of the warrant or the last renewal thereof at which time they shall be destroyed by a person designated by the chief justice. Notice prior to the destruction shall be given to the applicant attorney general or his successor or the applicant district attorney or his successor and upon a showing of good cause to the chief justice, the application, warrant, renewal, and return may be kept for such additional period as the chief justice shall determine but in no event longer than the longest period of limitation for any designated offense specified in the warrant, after which time they must be destroyed by a person designated by the chief justice.

O. Introduction of evidence.

1. Notwithstanding any other provisions of this section or any order issued pursuant thereto, in any criminal trial where the commonwealth intends to offer in evidence any portions of the contents of any interception or any evidence derived therefrom the defendant shall be served with a complete copy of each document and item which make up each application, renewal application, warrant, renewal order, and return pursuant to which the information was obtained, except that he shall be furnished a copy of any recording instead of the original. The service must be made at the arraignment of the defendant or, if a period in excess of thirty (30) days shall elapse prior to the commencement of the trial of the defendant, the service may be made at least thirty (30) days before the commencement of the criminal trial. Service shall be made in hand upon the defendant or his attorney by any investigative or law enforcement officer of the commonwealth. Return of the service required by this subparagraph including the date of service shall be entered into the record of trial of the defendant by the commonwealth and such return shall be deemed prima facie evidence of the service described therein. Failure by the commonwealth to make such service at the arraignment, or if delayed, at least thirty days before the commencement of the criminal trial, shall render such evidence illegally obtained for purposes of the trial against the defendant; and such evidence shall not be offered nor received at the trial notwithstanding the provisions of any other law or rules of court.

2. In any criminal trial where the commonwealth intends to offer in evidence any portions of a recording or transmission or any evidence derived therefrom, made pursuant to the exceptions set forth in paragraph B, subparagraph 4, of this section, the defendant shall be served with a complete copy of each recording or a statement under oath of the evidence overheard as a result of the transmission. The service must be made at the arraignment of the defendant or if a period in excess of thirty days shall elapse prior to the commencement of the trial of the defendant, the service may be made at least thirty days before the commencement of the criminal trial. Service shall be made in hand upon the defendant or his attorney by any investigative or law enforcement officer of the commonwealth. Return of the service required by this subparagraph including the date of service shall be entered into the record of trial of the defendant by the commonwealth and such return shall be deemed prima facie evidence of the service described therein. Failure by the commonwealth to make such service at the arraignment, or if delayed at least thirty days before the commencement of the criminal trial, shall render such service illegally obtained for purposes of the trial against the defendant and such evidence shall not be offered nor received at the trial notwithstanding the provisions of any other law or rules of court.

P. Suppression of evidence.

Any person who is a defendant in a criminal trial in a court of the commonwealth may move to suppress the contents of any intercepted wire or oral communication or evidence derived therefrom, for the following reasons:

1. That the communication was unlawfully intercepted.

2. That the communication was not intercepted in accordance with the terms of this section.

3. That the application or renewal application fails to set forth facts sufficient to establish probable cause for the issuance of a warrant.

4. That the interception was not made in conformity with the warrant.

5. That the evidence sought to be introduced was illegally obtained.

6. That the warrant does not conform to the provisions of this section.

Q. Civil remedy.

Any aggrieved person whose oral or wire communications were intercepted, disclosed or used except as permitted or authorized by this section or whose personal or property interests or privacy were violated by means of an interception except as permitted or authorized by this section shall have a civil cause of action against any person who so intercepts, discloses or uses such communications or who so violates his personal, property or privacy interest, and shall be entitled to recover from any such person—

1. actual damages but not less than liquidated damages computed at the rate of $100 per day for each day of violation or $1000, whichever is higher;

2. punitive damages; and

3. a reasonable attorney's fee and other litigation disbursements reasonably incurred. Good faith reliance on a warrant issued under this section shall constitute a complete defense to an action brought under this paragraph.

R. Annual report of interceptions of the general court.

On the second Friday of January, each year, the attorney general and each district attorney shall submit a report to the general court stating (1) the number of applications made for warrants during the previous year, (2) the name of the applicant, (3) the number of warrants issued, (4) the effective period for the warrants, (5) the number and designation of the offenses for which those applications were sought, and for each of the designated offenses the following: (*a*) the number of renewals, (*b*) the number of interceptions made during the previous year, (*c*) the number of indictments believed to be obtained as a result of those interceptions, (*d*) the number of criminal convictions obtained in trials where interception evidence or evidence derived therefrom was introduced. This report shall be a public document and be made available to the public at the offices of the attorney general and district attorneys. In the event of failure to comply with the provisions of this paragraph any person may compel compliance by means of an action of mandamus.

Section 1 [2]. **Chapter 166** of the General Laws is hereby amended by adding the following after **section 43:**

**Section 44.**

Service Observing, Interception.—Service observing of telephone lines conducted by telephone companies for the purpose of determining the quality of transmission or for any other purpose shall cease as soon as a connection is established between the users of the telephone line. Notwithstanding any other law, the line of any subscriber of a telephone company shall not be monitored by a telephone company for the purpose of service observing or random monitoring, if he shall so request in writing to the telephone company. Any subscriber may seek an injunction in the superior court to prevent such service observing or random monitoring.

The department of public utilities shall require that each telephone company file annually with it a complete report of all service observing activity carried on by any telephone company including the number of calls monitored during the previous calendar year, all rules and regulations of the telephone companies for such service observing, a complete description of the location of each service observing facility for each past calendar year, the number of employees engaged in service observing and a statement of the expenses incurred for such service observing to include salaries, cost of capital equipment and maintenance and replacement costs of such

equipment, and administrative expenses incurred. The department shall also conduct periodic inspections at least semiannually of such service observing to determine whether or not it complies with this section and the accuracy of the reports filed. In the event of the failure of any telephone company to comply with this section the department of public utilities must order that the activity cease until compliance is obtained and may seek an enforcement order in the Superior Court of Suffolk County.

Section 3. Section 25 of chapter 147, of the General Laws is amended by adding the following sentences after the last sentence of the first paragraph:

No person convicted of a violation of section ninety-nine or ninety-nine A of chapter two hundred and seventy-two of the general laws shall be granted a license and any license previously granted to such person shall be revoked.

Section 4. Section one hundred of chapter two hundred and seventy-two of the general laws is hereby repealed.

Section 5. Section one hundred and one of chapter two hundred and seventy-two of the general laws is hereby repealed.

Section 6. Section one hundred and two of chapter two hundred and seventy-two of the general laws is hereby repealed.

Section 7. If any provision of this act or application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.

Approved July 20, 1968.

## Table of Authorities Cited.

### Cases.


| | |
|---|---|
| Berger v. New York, 388 U.S. 41 | 9n. |
| Chapman v. California, 386 U.S. 18 | 2, 4 |
| Fahy v. Connecticut, 375 U.S. 85 | 2, 4 |
| Katz v. United States, 389 U.S. 347 | 6 |
| Monroe v. Pape, 365 U.S. 167 | 7 |
| On Lee v. United States, 343 U.S. 747 | 4, 5, 9 |
| Osborn v. United States, 385 U.S. 323 | 5, 6, 9 |
| United States v. Classic, 313 U.S. 299 | 7 |


### Statutes.


| | |
|---|---|
| Civil Rights Act, 42 U.S.C. § 1983 | 7 |
| Federal Communications Act, § 605 | 6 |
| Omnibus Crime Control and Safe Streets Act of 1968 | 7 |
| 31 Fed. Reg. 3,400, § 15.11 | 7 |


### Miscellaneous.


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|---|---|
| Pitler, "Eavesdropping and Wiretapping—The Aftermath of Ratz and Kaiser," 34 Brooklyn L. Rev, 223, 225 | 5 |

# Supreme Court of the United States.

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OCTOBER TERM, 1968.

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No. 358.

JACK DOUGLAS, ALEXANDER CELESTE, ARTHUR J. O'NEILL AND FRANK CELESTE,
*Petitioners,*

*v.*

THE COMMONWEALTH OF MASSACHUSETTS,
*Respondent.*

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## PETITIONERS' REPLY TO BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

### I.

The Commonwealth's main argument, in its brief in opposition (pp. 3-6), is that there was "*evidence sufficient to sustain*" petitioners' convictions even without the challenged tape recordings (Respondent's Brief at pp. 2-6). In other words, the Commonwealth is relying on a claim that the introduction of the tape recording was harmless error. And the Commonwealth apparently assumes that the prevailing Supreme Court rule is that a constitutional error will be deemed harmless if there was other "evidence suffi-

cient to sustain" the conviction.[1] But this is not the rule for evaluating the harmlessness of a constitutional error; indeed, the precise standard relied on by the Commonwealth in its brief was explicitly rejected by the Supreme Court in the recent cases of *Fahy* v. *Connecticut,* 375 U.S. 85, and *Chapman* v. *California,* 386 U.S. 18, a dispositive line of cases of which the Commonwealth is apparently unaware. In *Fahy* the Court said: "*We are not concerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of.*" The Court thus explicitly rejected the standard repeatedly relied on by the Commonwealth here. It adopted instead a much narrower standard of harmless error: There must be no "*reasonable possibility* that the evidence complained of *might have* contributed to the conviction." 375 U.S. at 86, 87 (emphasis added). In *Chapman* the Court squarely placed the burden on the state "to prove that there was no injury or to suffer a reversal . . ." 386 U.S. at 24. This burden can be satisfied only if this Court

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[1] The Commonwealth refers to this standard, and to no other, at least four times in its brief:

"The petitioners' convictions may be sustained wholly apart from the single taped conversation admitted in evidence." Respondent's Brief at p. 2.

"The Petitioners' Convictions Are Sustainable Wholly Apart From the Single Taped Conversation Admitted in Evidence." *Id.* p. 3.

"It is evident from an examination of the transcript of the trial and of the opinion of the Supreme Judicial Court, *Commonwealth* v. *Douglas,* 1968 Mass. Adv. Sh. 641, P. App. A 21, that substantial and comprehensive evidence sufficient to sustain a conviction on each substantive offense had been presented by the District Attorney *before* the recording complained of by the petitioners was played for the jury." *Ibid.*

"Admissible evidence presented relating to events prior to October 17 was more than sufficient to sustain all of the convictions." *Id.* p. 4.

is "able to declare a belief that it was harmless beyond a reasonable doubt." *Ibid.* Thus the applicable standard for determining harmlessness is a far cry from the standard relied on by the Commonwealth.[2] And surely the Commonwealth cannot be said to have satisfied its difficult burden of proving harmlessness "beyond a reasonable doubt."

The challenged evidence in this case is demonstrably not harmless under the applicable Supreme Court standards. The challenged evidence—a tape recording—was the only non-testimonial evidence offered by the Commonwealth. That the jury might well have disbelieved the testimony of the Commonwealth's chief witness was implicitly recognized by the court below, which observed:

> "On somewhat conflicting evidence the facts set out below could have been found. The jury were not required to believe, or to regard as controlling, other evidence, which might tend to reflect adversely on the testimony and the behavior of the Commonwealth's principal witness, Melvin Sacks . . ." (Petitioners' Appendix at pp. 21-22).

Indeed, there is a very high likelihood that the jury did, in fact, disbelieve some of the testimonial evidence offered by Mr. Sacks, the Commonwealth's chief witness. In cataloguing the testimonial evidence offered by the prosecution, the Commonwealth places first the fact that "Sacks testified that on August 24, 1966, Alexander Celeste struck Sacks in the face and kicked him in the stomach." What

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[2] The Commonwealth obviously confused the standard for determining the harmlessness of an error with the very different standard for directing a verdict. Needless to say, the Supreme Judicial Court did not, in this case, even suggest that the admission of the challenged tape was harmless. Nor, in fact, did the Commonwealth raise this frivolous claim in the lower court.

the Commonwealth omits to inform this Court is that petitioner Celeste was *acquitted* by the jury of the assault and battery charges growing out of this alleged incident.[3] It seems likely, therefore, that the jury disbelieved some, if not all, of Mr. Sacks' testimony; and that it placed great weight upon the "objective" character of the tape recording. Thus the Commonwealth's own catalogue of evidence would seem to establish—and certainly to create "a reasonable possibility"—that the introduction of the tape recording "might have contributed to the conviction." 375 U.S. 87. As this Court observed in *Chapman:* "An error in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot, under *Fahy,* be conceived of as harmless." 386 U.S. at 23-24. Accordingly, the Commonwealth cannot satisfy its burden of proving beyond a reasonable doubt that the claimed error in admitting the challenged evidence was harmless. This case, then, is an entirely suitable "vehicle for deciding" the issues raised in the petition (*cf.* Respondent's Brief at p. 2).

## II.

The Commonwealth's second argument (pp. 6-9) begins with the strange observation that petitioners did not refer to the case of *On Lee* v. *United States,* 343 U.S. 747, in its brief in the court below, and thus "the *On Lee* claim is being pressed in this Court for the first time" (Respondent's

[3] The court below explicitly recognized this. It said: "Sacks's testimony was that Celeste then hit him in the face, and kicked him in the stomach. See, however, the verdict that Alexander Celeste was not guilty of assault and battery (fn. 1)" (Petitioners' Appendix at p. 23). The Commonwealth says that its catalogue of evidence derived from the opinion of the Supreme Judicial Court. It is difficult to understand why it chose to mislead this Court by not indicating, as that court did, that this important piece of evidence was apparently disbelieved by the jury.

Brief at p. 6). A moment's reflection indicates how absurd that argument is in the context of this case. The *On Lee* case goes *against* petitioners' position; of course petitioners would not rely on that case below. Nor could they appropriately ask a *state* court to *overrule* a United States Supreme Court decision. This is the first appropriate occasion for pressing our claim that the *On Lee* case should be overruled by the Court that decided it.[4]

The Commonwealth also argues (pp. 7-9) that it "hardly seems important to grant the petitioners an opportunity to argue the issue whether or not society is prepared to recognize their expectation [of privacy] as reasonable when the answer is obvious" (Respondent's Brief at p. 8). But is the answer so obvious? In the recent case of *Osborn* v. *United States,* 385 U.S. 323 (1966), the defendant's expectation of privacy was no greater than the expectations here (see Petition at pp. 12-14). In both cases the words recorded constituted a crime. Yet in *Osborn,* the Court rested its decision on the fact that the prosecutor there employed "'"the procedure of antecedent justification before a magistrate that is central to the Fourth Amendment"' as 'a precondition of lawful electronic surveillance'" (385 U.S. at 330). Thus the answer to the question raised by this petition is far from obvious. This is reflected in the division of the courts (see Petition at pp. 14-20) as well as in the academic journals (see Petition at pp. 13-14; see also Pitler, "Eavesdropping and Wiretapping—The Aftermath of Katz and Kaiser," 34 Brooklyn L. Rev. 223, 225: "It is unclear from Katz whether the Osborn type of electronic surveillance requires prior judicial authorization").

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[4] Although *On Lee* was not referred to by name in the proceedings below, the arguments and decision did focus on the issues raised by that case. There is, of course, no requirement that specific cases be cited below; only that the issues be raised. The Commonwealth does not—nor could it—claim that these issues were not raised or resolved below.

Moreover, it is important to recall that petitioners are not asking this Court to hold that "threats of extortion and intimidation go unheard," as the Commonwealth suggests (p. 8). Petitioners are asking this Court to decide whether it shall be the police or a magistrate who determines when there is sufficient cause to warrant overhearing and recording of conversations intended to be private. And the Commonwealth has proposed no reason why this decision should not be left to a disinterested judicial officer, at least where, as here, there are no "legitimate needs of law enforcement [which] . . . demand specific exceptions. . . ." *Katz* v. *United States,* 389 U.S. 347, 362 (Harlan, J., concurring).

## III.

Petitioners asked this Court to interpret a regulation promulgated under section 605 of the Federal Communications Act to require prior judicial authorization as a condition to lawfully recording a conversation under the circumstances of this case (Petition at pp. 17-18). The regulation, which generally prohibits wiretaps with the consent of only one party, makes exception for recording by any law enforcement officers conducted under "lawful authority"; and it is petitioners' view that "lawful authority" requires prior judicial approval of the sort obtained in *Osborn* v. *United States,* 385 U.S. 323 (1966), but not obtained here. The Commonwealth's only response to this argument is to point out that a "phrase similar to 'under lawful authority' is used in the recently enacted Omnibus Crime Control and Safe Streets Act of 1968. . . ." The phrase to which the Commonwealth refers is the familiar one, "under color of law." But this phrase is not at all similar to "lawful authority"; indeed, its usual meaning is diametrically

opposite. Under *color* of law usually suggests an *illegal or unlawful* act "made possible only because the wrongdoer is clothed with the authority of state law . . ." *United States* v. *Classic,* 313 U.S. 299, at 326. This is the way that phrase is used in the Civil Rights Act, 42 U.S.C. § 1983; see *Monroe* v. *Pape,* 365 U.S. 167. Surely, the promulgators of 31 Fed. Reg. 3,400, § 15.11, did not intend to authorize such illegal abuse of the police uniform. The phrase "under lawful authority" suggests something quite different from "under color of law." It suggests that the authority under which the police are acting is *actually* lawful, and not merely *colorably* lawful. And petitioners submit that the only authority that can lawfully authorize the kind of wiretap involved here is a disinterested judicial officer. To read the regulation as the Commonwealth proposes would give unlimited license to the police by virtue of their uniform alone and without reference to the actual lawfulness or lawlessness of their activities. Such an interpretation would render the regulation nugatory.

The Commonwealth also points to the fact that the recently enacted Omnibus Crime Control and Safe Streets Act of 1968 would seem to permit the kind of wiretap in question here. In the first place, that statute was simply not in effect at the time the wiretap or the trial in this case occurred. Thus the new statute can have no effect on petitioners' rights. In the second place, the conflict that petitioners have asked this Court to resolve is a conflict over the proper interpretation of the United States Constitution, not of a statute. The Courts that have required prior judicial approval have done so because they read the Constitution as requiring it. It is inconceivable that the enactment of a new statute will make them change this position. Indeed, the enactment of a statute apparently in conflict with the constitutional holdings of two Circuits

makes resolution of this issue even more pressing. Law-enforcement authorities and the public have a right to know whether the Constitution does, or does not, require prior judicial approval before a wiretap, such as the one here at issue, can be admitted into evidence. And this case provides an appropriate vehicle for deciding that critical constitutional question.

## IV.

The Commonwealth's final argument (IV, pp. 11-13) is indeed difficult to understand and relate to this case. It asks this Court to postpone "an adjudication" of petitioners' claims until "a time at which the operative effects of [Massachusetts' newly enacted wiretap statute] may be fairly assessed" (Respondent's Brief at p. 13). But the highest court of Massachusetts held in this very case, and in others since, that the circumstances at issue here gave rise to "no violation of G.L. c 272 § 99. . . ." (Petitioners' Appendix at p. 28). And the newly enacted statute explicitly exempts recordings "if the officer is a party to such communication or has been given prior authorization to record or transmit the conversation by such a party. . . ." (Respondent's Brief at p. 12). In other words, the Massachusetts legislation—both new and old—provides no protection whatever against the kind of recording at issue here.[5] What conceivable benefit can possibly be obtained by postponing "an adjudication" of the issues raised in this case? The "operative effects" of the Massachusetts legislation on the practice challenged here "may be fairly assessed" right

[5] The Commonwealth appears to concede this on page 9, note 6, when it says that "Recently enacted Massachusetts legislation similarly allows the acts complained of by petitioners without prior judicial authority. . . ."

now: it has no operative effect whatever; it authorizes this kind of recording without any reservations or safeguards. And this is precisely what petitioners challenge as unconstitutional.[6]

## Conclusion.

In this reply brief, petitioners have responded to the major arguments made by the Commonwealth. In closing, it is important to point out that the Commonwealth has left many of petitioners' arguments unchallenged. Most important, they apparently concede—as they should—that there is a clear and direct conflict between the Circuits, and between two Circuits and the Massachusetts Supreme Judicial Court (see Petition at pp. 14-19). The existence of such conflicts is a prime criterion for this Court's decision to grant the writ of certiorari. The Commonwealth also apparently concedes that there is a conflict between the decision below and between the rather strong dictum of this Court in the *Osborn* case. Nor does the Commonwealth appear to dispute our claim that *On Lee* is no longer good law and should be overruled. Finally, the Commonwealth presents no substantive arguments against the requirement

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[6] The Commonwealth attempts to obtain undue mileage from its claim that the new statute "evidenced a cooperation with the letter as well as the spirit of the Berger opinion." It did not "cooperate" at all with "the spirit" of *Berger* in the area relevant to this case. In *Berger* the Court cited the *Osborn* case with approval and called the recording there "an invasion of the privacy protected by the Fourth Amendment" which was "admissible because of the authorization of the judges . . ." 388 U.S. 41 at 56-57. How, then, can it be said that a statute—like the Massachusetts one—which specifically authorizes that kind of "invasion" without prior judicial authorization, "evidenced a cooperation with the letter as well as the spirit of the Berger opinion?"

of prior judicial approval for wiretaps of the kind involved here.

For the foregoing reasons, petitioners respectfully request that the petition for a writ of certiorari be granted.

Respectfully submitted,

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